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169

VERMONT, SUPREME COURT
REPORTS

C#

OF

CASES ARGUED AND DETERMINED.

IN

THE SUPREME COURT

OF THE

STATE OF VERMONT.

BY

WILLIAM G. SHAW.

VOL. 34.

NEW SERIES, VOL. 5.

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PUBLISHED BY TUTTLE & GAY,

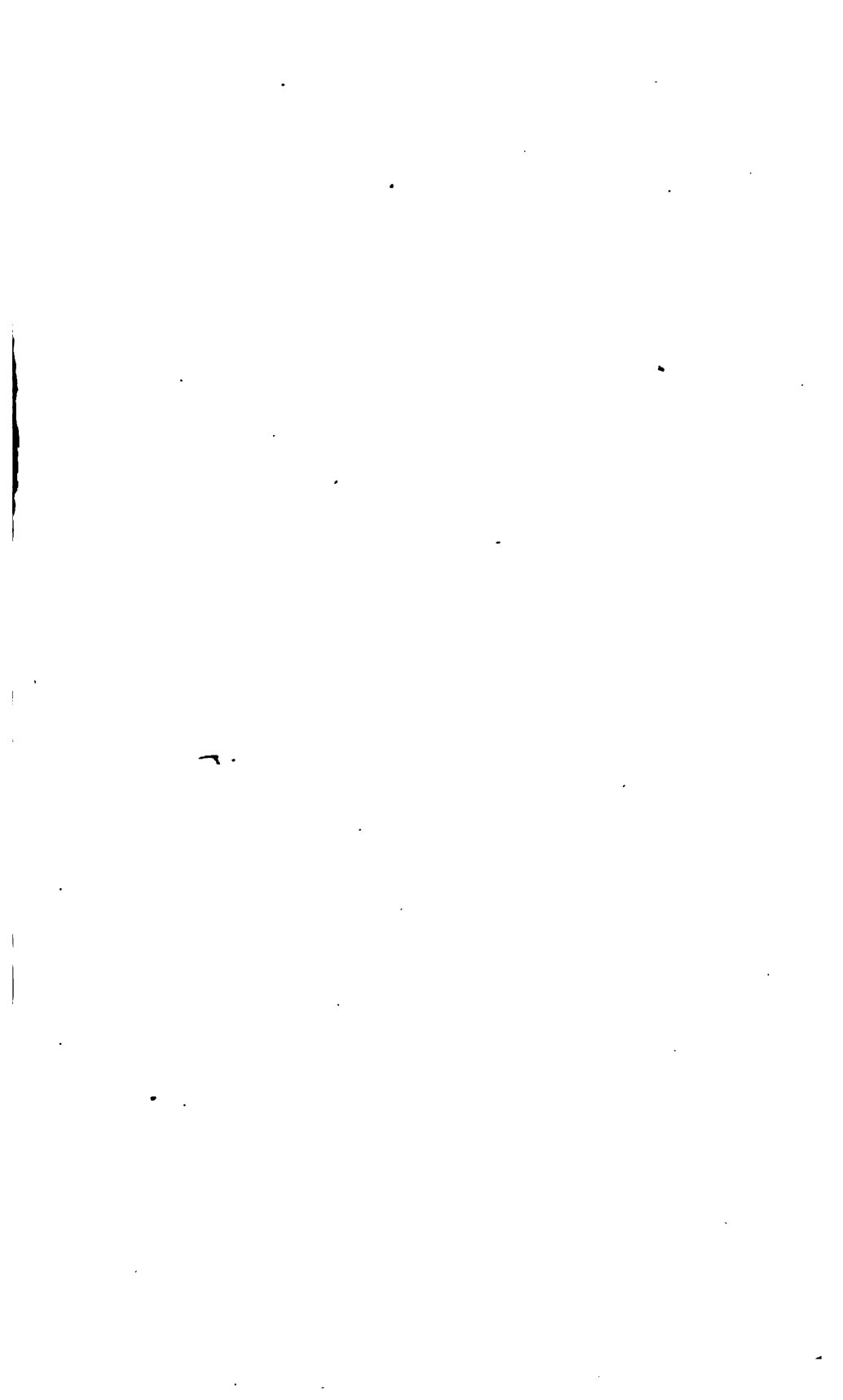
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Rec May 19. 1864





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JUDGES
OF THE
SUPREME COURT

DURING THE TIME OF THESE REPORTS.

HON. LUKE P. POLAND, CHIEF JUDGE.

HON. ASA O. ALDIS,	}	ASSISTANT JUDGES.
HON. JOHN PIERPOINT,		
HON. JAMES BARRETT,		
HON. LOYAL C. KELLOGG,		
HON. ASAHIEL PECK,		

ERRATA.

Page 77, line 11 from bottom, for 28 read 43.

" 77, line 10 from bottom, for 43 read 23.

" 87, lines 5 and 6 of head note, for *were creditors* read *was a creditor*.

" 155, line 11 from top, between *in* and *town* insert *that*.

" 262, line 18 from bottom, for *suphra* read *supra*.

" 397, line 11 from bottom, for *defendant* read *plaintiff*.

" 427, line 15 from top, for *recorded* read *recovered*.

" 480, line 24 from bottom, for *apostatis* read *asportatis*.

" 495, line 14 from bottom, for *owners* read *ownership*.

" 526, line 2 from bottom, for *revisionary* read *reversionary*.

C A S E S

ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF THE

STATE OF VERMONT,

FOR THE

COUNTY OF FRANKLIN,

AT THE

JANUARY TERM, 1861.

PRESENT:

HON. LUKE P. POLAND, CHIEF JUDGE.

HON. JAMES BARRETT,

HON. LOYAL C. KELLOGG. } ASSISTANT JUDGES.

THE VERMONT AND CANADA RAILROAD COMPANY v. THE VERMONT CENTRAL RAILROAD COMPANY, JOHN SMITH, WILLIAM R. LEE, JOHN S. ELDRIDGE, WILLIAM H. GREGORSON, JOHN C. PRATT, GEORGE M. DEXTER, WILLIAM APPLETON,

Vermont and Canada R. R. Co. v. Vermont Central R. R. Co. et al.

SILAS PEIRCE, WILLIAM H. SUMNER, WILLIAM SOHIER,
FITZ HENRY HOMER, AND H. HOLLIS HUNNEWELL.*

*Corporations. Contract. Railroad. Forfeiture. Pledge. Lien.
Interest.*

If a contract between two corporations is not in violation of some public law or contrary to public policy, it *seems* that only the immediate parties to it, as the corporations themselves, or the stockholders, who are parties by representation, hold such a legal position in relation to the contract, as to entitle them to raise the question of its validity on account of the alleged want of capacity of the parties to make it.

The contract of lease between the Vermont and Canada Railroad Company, and the Vermont Central Railroad Company, made August 24th, 1849, and the addition thereto made July 9th, 1850, were not *unlawful* in the sense of being in violation of some public law, or contrary to public policy. Those corporations themselves and their stockholders having assented to the validity of those contracts, it is not competent for a bondholder, under the first mortgage of the Vermont Central Railroad Company, which mortgage was given in express recognition of and subjection to those contracts, to object to their validity on account of the want of capacity of those corporations to make them.

Though the charters of those corporations did not authorize such contracts, the general act of 1847 (Comp. Stat. chap. 26, sec. 66,) did; and it was competent for the corporations, by the unanimous consent of their stockholders, to accept the additional powers granted by that act, and to exercise them with the same efficiency to every intent, as if they had been conferred by the original acts of incorporation. The exercise of these powers by the stockholders of those corporations, in authorizing the contract of July 9th, 1850, at a meeting held for that purpose, without any objection on the part of any one of them, either at that time or subsequently, is sufficient ground of presumption that the corporations, as such, had accepted them as part of their organic law; and that the stockholders all concurred in the action then taken, and that they assent to its effect for all legitimate purposes touching the rights, either of the corporation or of themselves individually, as members of such corporation.

The claim that the indentures of August 24th, 1849, and July 9th, 1850, are not a lease and security for rent, but a pretext and cover under which the Vermont Central Railroad Company went on and built, with its own funds and means, the Vermont and Canada Railroad, the same as if the latter company had not existed, the pretended taking of stock in that company

* This cause was argued before POLAND, Ch. J., and BARRETT and KELLOGG, J. J. The other judges having been of counsel in the case did not sit at the hearing.

Vermont and Canada R. R. Co. v. Vermont Central R. R. Co. et al.

being in fact a loan of money by the stockholders to the Vermont Central Railroad Company at a guaranteed interest of eight per cent.,—this claim, on the part of the defendant Sohler, discussed and held unfounded.

The Legislature of Vermont, by the acts of November 18th and November 25th, 1858, (acts of 1858, pp. 182 and 185) in regard to the time of completion of the Vermont and Canada Railroad, and the mode of the operation of that road, in case the charter of that company should become forfeited, did not undertake to *declare a forfeiture*, but only to prescribe the consequences to flow from certain future acts and omissions on the part of that company. The question, therefore, whether a forfeiture of the charter of that company has occurred, can only be determined in a proper judicial proceeding brought in behalf of the public, for the purpose of testing that question.

In the present posture of the case, the time for the completion of the Vermont and Canada Railroad, as fixed by the legislature in 1859, not having expired; *held*, that there has not been such a failure on the part of the orators to perform the undertakings on their part in the instruments of lease, or the requirements of their charter and the amendments thereto, as will discharge the Vermont Central Railroad Company, or the trustees or bondholders under the first mortgage of that road, from the obligation to pay rent for such portion of the Vermont and Canada Railroad as has been completed, and proffered for acceptance, or from their subjection to the pledge of the tolls, etc., of both roads, as security for such rent.

Held, therefore, that the indenture of August 24th, 1849, is a valid instrument between the parties, and that of July 9th, 1850, is valid in constituting a pledge and lien, by way of security for the payment of the stipulated rent, upon the tolls, fares and incomes of the two roads, in priority to the trustees and bondholders, and that the same is enforceable for the rents in arrear of the Vermont and Canada Railroad, as already constructed and used.

Held, that though as an open question, independently of the action of the parties, it would seem that the contract of lease contemplated that the sum on which the eight per cent. should be cast, to arrive at the amount of rent to be paid by the Vermont Central Railroad Company, was to be the actual outlay of money directly for the construction of the Vermont and Canada Railroad; still the meaning put upon the contract by the parties themselves by the payment of rent and the adjustment of accounts, appears so clearly to have been that the cost of construction should be measured by the capital stock of the Vermont and Canada Company paid in, with interest on the expenditures from the time they were made in pursuance of the contract of lease, that such must be taken to be the true meaning of the contract in that respect.

It is not enough, in order for the bondholders to avoid the effect of the contract, as understood and acted upon by the two companies in this respect, to show that as between themselves and the Vermont Central Railroad Company it would be prejudicial and unjust to them to give the contract that effect; but they must also show that it would be inequitable on the part of the Vermont

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and Canada Company as against them, to have such effect given to it. This they have failed to show.

If a contract is silent on the subject of interest, and does not by implication exclude it, on money due and payable under the contract the law implies that interest is to be paid from the time the debt becomes payable.

The compromise agreement of April, 1857, between the two corporations, that the sum of thirty-two thousand six hundred and seventy-two dollars and fifteen cents should be added to the cost of construction of the Vermont and Canada Railroad, though possibly effective as a settlement between the parties themselves, is not binding upon the trustees and bondholders, they having previous to that time supplanted the Vermont Central Company in the immediate interest to be affected by the allowance of that claim; and, the masters having failed to find that that sum was a part of the costs of construction, the same is disallowed.

The orators' claim for incidental expenses disallowed.

The sum on which, as cost of construction, the eight per cent. is to be computed as the measure of the rent due the orators, fixed at one million three hundred and forty-eight thousand five hundred dollars.

APPEAL from the decree of the court of chancery.

The bill was brought in April, 1855, and set forth that the orators were incorporated by an act of the legislature of this State, approved October 31st, 1845, (see acts of 1845, No. 25 p. 65) and that the Vermont Central Railroad Company was incorporated by the same legislature by an act approved October 31, 1843. (See acts of 1843, No. 53 p. 43.)

That certain articles of agreement were duly entered into by those corporations on the 24th of August, 1849, the 11th of January, 1850, and the 9th of July, 1850, respectively, in the following words, viz :

Agreed unto of August 29th, 1849.

" These articles of agreement, made this twenty-fourth day of August, in the year eighteen hundred and forty-nine, by and between the Vermont Central Railroad Company of the first part, and the Vermont and Canada Railroad Company of the second part, both being corporations established by the authority of the State of Vermont,

Witnesseth :

That whereas it is agreed by and between the parties hereto, that the Vermont and Canada Railroad Company shall proceed

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(with all dispatch consistent with the amount of labor to be done,) to construct and finish the Vermont and Canada railroad, and that the same shall be leased to, and run by, the Vermont Central Railroad Company;

NOW, THEREFORE, the Vermont and Canada Railroad Company hereby agree with the Vermont Central Railroad Company to provide forthwith the necessary funds, and to proceed to construct the said Vermont and Canada railroad, its fixtures and buildings; to settle and pay all land and other damages, and to do and complete all other arrangements and things, in a proper and legal manner, so that their right and title to said road, and to the use of it, shall be clear and unquestionable. It being understood and agreed that the several sections and portions of said Vermont and Canada railroad shall be constructed at such limitation of cost within such time, on such location, and in such way and manner in all respects, as shall be conformable to their charter, and as shall be satisfactory to, and approved by, the directors of the Vermont Central Railroad Company, or any agent whom said directors will appoint for that purpose.

And the Vermont and Canada Railroad Company, in consideration of the premises and of the covenants of said Vermont Central Railroad Company, hereinafter contained, agree to grant lease and demise, and so far as they have present legal authority do hereby grant, lease and demise unto the Vermont Central Railroad Company, their successors and assigns, the whole of said Vermont and Canada railroad as the same is now located or shall be hereafter located and constructed, together with all the lands, depots, buildings, tracks, fixtures, property, rights and privileges thereto appertaining or belonging, or which may hereafter be procured or purchased by, or be granted, appertain, or belong to the said road with the full right and privilege of using the said road, depots, and other property and rights, with cars, engines and other motive power, or to permit, or authorize others so to use the same, in any way which the Vermont Central Railroad Company, their successors or assigns, may from time to time elect; and as fully and freely as the Vermont and Canada Railroad Company might or could do under their charter, and any additions made, or to be made thereto.

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TO HAVE AND TO HOLD the said Vermont and Canada railroad as the same is now located, or shall hereafter be located or constructed, and all lands, depots and other property, rights and privileges, whether now acquired or hereafter to be procured, unto the said Vermont Central Railroad Company, their successors and assigns forever, as fully and freely to all intents and purposes, as the Vermont and Canada Railroad Company might or could have, enjoy, and use the same under their charter, and any additions made, or to be made thereto:—Subject, however, (in case this instrument shall be held to be a present lease,) to the right of the Vermont and Canada Railroad Company, their officers, agents and workmen, to enter upon said road for the purpose of constructing the same, and completing the arrangements herein covenanted, on their part, to be made; this right to cease as soon as said road shall be accepted by the Vermont Central Railroad Company, as completed:—Subject also to the right of the legislature of the state of Vermont, after the expiration of FIFTY years from the opening of the road for use, to purchase the same, as provided in the sixteenth section of the charter of said company:—and, subject, lastly, to the legal rights, if any, of all other railroad companies to use the same.

And to enable the Vermont Central Railroad Company beneficially to enjoy and improve the said property, rights and privileges, the said Vermont and Canada Railroad Company hereby nominate, constitute and appoint, the Vermont Central Railroad Company, their successors and assigns, their attorneys, irrevocable, with full power and authority to use the name of the Vermont and Canada Railroad Company, in and about the future repair, management and use of the said Vermont and Canada railroad, and all the property, rights and privileges which may at any time appertain thereto, with the right and power, so far as the same may lawfully be done, to connect said road with other railroads; to make branch or side tracks, and to make such alterations in the leased and granted premises, as the convenient use thereof shall be found to require, and as may lawfully be done; also with the right and power to establish, receive and collect tolls, fares, rates of compensation, and rents for the use of said road, and other property, or for the transportation of

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persons, merchandise, mails, and every description of property upon and over said road or any part thereof, for the sole use and benefit of the Vermont Central Railroad Company, their successors and assigns; and to make any contracts, covenants, or agreements proper and necessary for all the purposes herein provided for, with any persons or corporations whatever, in the name of the Vermont and Canada Railroad Company, and under their corporate seal or otherwise. And generally to do all other acts and things in the premises which the Vermont and Canada Railroad Company might lawfully do; with full authority also. to use the name of the Vermont and Canada Railroad Company in and about all proceedings at law, or in equity, which the Vermont Central Railroad Company may judge necessary or expedient, in and about all the business and proceedings aforesaid, or for the purpose of fully securing to the Vermont Central Railroad Company, their successors and assigns, the quiet and beneficial enjoyment, possession and use of said road, and of all the property, rights and privileges hereby granted, secured and demised, or for any other purpose consistent with the true intent and meaning of this indenture; and with the right for all the purposes aforesaid, from time to time, to substitute and appoint, one or more attorneys under the Vermont Central Railroad Company, and their powers at pleasure to revoke.

And the Vermont and Canada Railroad Company hereby agree with the Vermont Central Railroad Company, their successors and assigns, at all times to continue and preserve the legal organization of the Vermont and Canada Railroad Company, and at all times to hold such meetings, pass such votes, appoint all such officers and confer upon them all such powers, keep such records of their proceedings, make such reports to the legislature or otherwise, as may be required by law, and do all such other acts as may be necessary and proper to carry into full effect all the objects and provisions of this indenture; and that they will, on reasonable demand, at any and all times hereafter, give such other assurances as may be necessary or proper therefor.

And the said Vermont and Canada Railroad Company agree, that if the Vermont Central Railroad Company shall at any time after TWENTY years from the opening of said Vermont and

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Canada railroad for use, elect to purchase the demised premises, and shall have the legal right to make such purchase, then the Vermont and Canada Railroad Company will give to the Vermont Central Railroad Company, their successors or assigns, an absolute grant, assignment and release, in perpetuity, of the said road, and of all the other property, rights, privileges and franchises of said Vermont and Canada Railroad Company, by a deed or other instrument proper and legal therefor, running to the Vermont Central Railroad Company, or such party as they shall designate:—upon payment by the Vermont Central Railroad Company to the Vermont and Canada Railroad Company, of an amount sufficient to pay to each stockholder in the Vermont and Canada Railroad Company the par value of his shares: and will cause the said shares to be transferred to such persons or corporation as the Vermont Central Railroad Company shall designate.

And the Vermont and Canada Railroad Company agree that they will at no time interfere or act, in the use and management of their road or any of its appurtenances, except in the manner herein mentioned, or unless they shall be required so to do by law, or by the written request of the Vermont Central Railroad Company.

And the Vermont and Canada Railroad Company hereby farther agree that, when their road shall be completed, and the titles to the same, and to the lands, fixtures, and other property thereof, shall be vested in them, they will, on request, execute and deliver to the Vermont Central Railroad Company, their successors or assigns, a deed of confirmation, reassuring the provisions of this instrument upon the terms and conditions thereof, so far as the same may be then applicable.

And the said Vermont Central Railroad Company on their part agree, that when said Vermont and Canada railroad and its appurtenances shall be constructed in manner aforesaid, and ready for use, they will provide the necessary power and other equipment, and will open and run the same at all suitable times hereafter for the accommodation of the public, and will pay as a rent therefor, in addition to the necessary incidental expenses of said Vermont and Canada Railroad Company, a sum equal to eight per cent annually upon the amount of the whole cost, for the

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time being, of said road, its buildings, fixtures, lands and appurtenances, as the same shall have been paid by the Vermont and Canada Railroad Company;—the said rent to begin on the first day of December next, and to be thereafter paid semi-annually on the first days of June and December, in each year, until said road shall be purchased by the legislature of Vermont, or by the Vermont Central Railroad Company, as before mentioned.”

Agreement of January 11th, 1850.

“The parties in the foregoing articles of agreement hereby mutually agree, that the same shall be and hereby are amended by substituting ‘FIFTY’ years for ‘TWENTY’ years, as the period after which the Vermont Central Railroad Company may, on the terms expressed in said articles, require an absolute grant, assignment, and release in perpetuity of the property, rights, privileges and franchises of the Vermont and Canada Railroad Company: it being understood that said articles are to be of the same force and effect in all respects, as if said word ‘FIFTY’ had been there originally written instead of ‘TWENTY.’”

Agreement of July 9th, 1850.

“WHEREAS, it has been suggested that if from any unforeseen causes, the said Vermont Central Railroad Company should fail to pay the said rent, reserved by the preceding articles, there might occur some embarrassment or interruption in the working of the said Vermont Central and Vermont and Canada railroads, as one continuous line of railroad, whereby the interests and accommodation of the public would be prejudiced and the business and affairs of both the said companies suffer injury—and—

WHEREAS, for the prevention thereof as well as to afford to the Vermont and Canada Railroad Company reasonable security in the premises, it has been deemed fit to make an addition to the foregoing articles.

Now, the parties thereto, have further agreed, respecting the leasing and running of the aforesaid road in manner following:—

First,—If at any time or times before the said Vermont and Canada railroad shall be purchased as mentioned, or provided for by the aforesaid articles, the rent therein reserved should be, and remain in arrear, and unpaid for the space of four months

after the same shall be payable, it shall be lawful for the said Vermont and Canada Railroad Company, to enter, or take possession of, and use, and run, not only the said Vermont and Canada railroad, but also the said Vermont Central railroad, together with all lands, depots, and other property, rights and privileges then owned and enjoyed by each of the aforesaid companies, and used in connection with, or for the purpose of running or working each of the said railroads; and, having thus entered, it shall be lawful for the said Vermont and Canada Railroad Company, to receive all tolls, fares, and other lawful income receivable for the use of said railroads, and after paying therefrom all reasonable expenses of running and working the said railroads and of making all such repairs of each of the said railroads, or any buildings or structures connected therewith or used therefor, and also the cost of all such engines, cars, and other furniture as may be found necessary during the time or times such roads shall be so worked and run, as last aforesaid—the said Vermont and Canada Railroad Company shall apply the residue of its said receipts in, and towards the payment of all rent then in arrear and unpaid, whether the same became payable before, or during the time while so in possession as last aforesaid:—and when, and as soon as the same shall be paid in full, by means of the net receipts aforesaid, or by the Vermont Central Railroad Company, then notice thereof shall be given by the said Vermont and Canada Railroad Company, to the said Vermont Central Railroad Company, and thereupon, or without such notice, the last named company shall have the right and it shall be its duty to resume possession, and control of both said railroads in the same manner, and with the same rights and subject to the same duties as before such entry by the said Vermont and Canada Railroad Company.

Second,—It shall be the duty of the Vermont and Canada Railroad Company, while so in possession as aforesaid, to keep full, just and true accounts of all receipts and expenditures, and the same at all reasonable times to exhibit and render, on request to the said Vermont Central Railroad Company, and generally while working and running the said Vermont Central railroad, to discharge, as well to the public as to individuals, all duties by

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law incumbent on one railroad company, which, pursuant to the laws of Vermont, has made an arrangement with another railroad company, to work or run its road, the expenses whereof to be deducted from the receipts aforesaid.

Third,—For the purpose of carrying this arrangement into full effect, the said Vermont Central Railroad Company, in consideration of the premises in the foregoing and these articles contained, and of one dollar to the said Vermont Central Railroad Company by the Vermont and Canada Railroad Company paid, the receipt whereof is hereby acknowledged, does hereby grant, bargain, sell and convey unto the said Vermont and Canada Railroad Company, its successors or assigns forever, the said Vermont Central railroad, as now constructed and built, and all its lands, depots and easements, property, rights and privileges, which the said Vermont Central Railroad Company, may or can, by any way, or means, lawfully sell and convey.

TO HAVE AND TO HOLD the same to the said Vermont and Canada Railroad Company, its successors or assigns, to and for its own use.

PROVIDED, NEVERTHELESS, and these presents are upon the express condition that if the said Vermont Central Railroad Company, shall well and truly pay or cause to be paid, the rent reserved and made payable to the said Vermont and Canada Railroad Company, by the foregoing articles, when and as the same is therein made payable, so that there shall be no default therein, then the above conveyance by the Vermont Central Railroad Company shall be void; and provided further, that until some default shall be made by the Vermont Central Railroad Company, in the payment of the rent reserved as aforesaid, it shall be lawful for the Vermont Central Railroad Company to retain possession of all the property hereby conveyed; and provided further, that if any one or more defaults should be made by the Vermont Central Railroad Company in the payment of said rent reserved as aforesaid, so that the Vermont and Canada Railroad Company should go into possession under this instrument, it shall nevertheless be lawful for the said Vermont Central Railroad Company to resume possession, at the times and in the manner hereinbefore provided; and such possession may continue until some other

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and further default, by non-payment of the said rent shall be made.

And the said Vermont Central Railroad Company does hereby constitute and appoint the Vermont and Canada Railroad Company, (or at its election, the president of the Vermont and Canada Railroad Company, for the time being,) their true, sufficient and lawful attorney, in the name of the Vermont Central Railroad Company, and otherwise, as the case may require, to do any, and all acts, matters and things necessary to carry into full effect, the true intent and meaning of the foregoing articles and conveyances.

To remove all doubt, as to the meaning of the parties to the foregoing articles, it is hereby declared that, the rent to be paid under the foregoing articles, is EIGHT PER CENT per annum, on all sums expended, from time to time, by the Vermont and Canada Railroad Company, for the cost of their said road, which per centum is to be reckoned upon such sum from the time when the same shall be paid.

It is hereby further mutually agreed, that when the Vermont and Canada Railroad Company, shall have finished their said road, agreeably to the provisions of the foregoing articles of agreement, then the Vermont and Canada Railroad Company shall have no further right to expend money on said road, but the Vermont Central Railroad Company shall have the right to expend such amount of money, in improving and perfecting said road, buildings and other fixtures, as they may find necessary or convenient, for the more perfect enjoyment of said road, all to be at the expense of the Vermont Central Railroad Company, and not to be charged to the Vermont and Canada Railroad Company; and that there may be no unnecessary delay in the acceptance of the said Vermont and Canada railroad, by the said Vermont Central Railroad Company, it is further agreed, that, in accordance with the intentions of the parties to this agreement, the Vermont and Canada Railroad Company have caused the road to be located and graded, and have contracted for the iron, all with the knowledge and to the acceptance of the Vermont Central Railroad Company, and that the present agents and engineers who have thus far progressed in the contracts

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and works, or others, not objectionable to the Vermont Central Railroad Company, shall continue to finish the same, and shall, in behalf of said Vermont Central Railroad Company, inspect and accept the work of building the said Vermont and Canada railroad from time to time, when, and as the same progresses, and is done; and the same being so, from time to time, accepted, shall be deemed to be an acceptance within the meaning of the foregoing articles.

And it is further mutually agreed, that in case it shall hereafter become necessary, for the Vermont and Canada Railroad Company, in order to comply with the requisitions of their charter, to extend their road into the village of Burlington, or to any other point or points, by any route now located or which may be hereafter located, the said Vermont and Canada Railroad Company agree to grant, lease and demise, and so far as they have present legal authority, do hereby grant, lease and demise, unto the said Vermont Central Railroad Company, their successors or assigns, the portions of their road, which may be so hereafter built, subject to the same conditions, restrictions and privileges, as are contained in the foregoing articles, and that the said Vermont Central Railroad Company, will accept the same when built, and will pay the same rent therefor, and in the same manner, and upon the same terms, and with the like remedies for non-payment as is heretofore specified in these articles; and it is hereby further mutually agreed that the Vermont and Canada Railroad Company, will appoint such person or persons, as the Vermont Central Railroad Company shall designate, as agent or agents, for the construction of such addition or additions as may be deemed necessary to be, hereafter, built as aforesaid.

And it is further declared that nothing herein contained, shall prevent the Vermont and Canada Railroad Company from resorting to an action at law, to recover any rent in arrear, if they shall choose to do so."

And further setting forth that these agreements were duly authorized, accepted and ratified, by both of said corporations; that the orators, in pursuance thereof, constructed and completed their road, and the Vermont Central Railroad Company accepted and took possession thereof in the fall of 1850, and since then had,

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by themselves, or by trustees appointed under them, managed and run that road, in connection with the Vermont Central railroad, down to the date of the bill; that the cost of the construction of the orators' road, prior to June 1st, 1854, was \$1,350,000, upon which the rent reserved, being \$108,000 annually, had been paid to the orators by the Vermont Central company, or their trustees, up to and inclusive of the rent falling due June 1st, 1864; but that no rent had been paid since that time, notwithstanding the same had been frequently demanded by the orators both of the Central company and their trustees hereinafter mentioned; that in October, 1851, the Vermont Central company issued its obligations or bonds to the amount of \$2,000,000, dated Nov. 1st, 1851, and payable in ten years from date, with interest semi-annually, at seven per cent., and in order to secure the payment thereof, on the same day executed a mortgage of their road, franchises and personal property to three persons in trust for such bond-holders; that, at the time of bringing this bill, the defendants, John Smith, William Raymond Lee, and John S. Eldridge, held the position of trustees under said mortgage, and that the defendants, William Sohler and several others named in the bill, were holders of the bonds secured by that mortgage, and were made parties to this proceeding to represent such holders; that on the 28th of June, 1852, the Vermont Central Railroad Company, by deed duly executed, surrendered possession of all the property and franchises conveyed in the last mentioned mortgage, to the trustees therein named, for the purposes therein mentioned, with a proviso in such deed of surrender that the trustees might deliver back such property and franchises, whenever in their judgment the interests of the bondholders would permit, and that the trustees accepted such surrender and took possession of the property, and had continued in the possession and management thereof down to the date of the bill; that since the failure to pay the rent due the orators on the 1st of December, 1854, they had requested the said trustees to surrender to them the possession of the two railroads under their charge, together with the personal property used on and in connection with the same, in accordance with the agreements between the Vermont Central company and

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the orators, set forth in the bill, but that the trustees had wholly refused so to do.

The bill also set forth the issue by the Vermont Central company of other bonds, and the execution by them of a second mortgage, to secure the same, to certain trustees, who were named in the bill.

The prayer of the bill was "that the said Vermont Central Railroad Company, and the said trustees, Smith, Lee and Eldridge, be ordered and decreed by the court to pay to your orator forthwith the amount of the rent so reserved and due, and payable to your orator on the 1st day of December, A. D. 1854; and that in the meantime, and until such rent is paid to your orator, that the said Smith, Lee and Eldridge be ordered to allow your orator to enter and take possession of, and use and run the Vermont and Canada railroad and the Vermont Central railroad, with all lands, depots and other property, rights and privileges now owned and enjoyed by your orator or the said Vermont Central Railroad Company, and used by the said trustees, Smith, Lee and Eldridge, in connection with, or for the purpose of running or working said railroads, and all engines, cars, tools, machines, machinery, equipment and other personal property, now in possession of said trustees, and used by them in connection with, and for working, running, or repairing said railroads, or managing the business thereof, and which the said trustees, or any of them, received or now hold under such deed of trust or deed of surrender as aforesaid, or which they or the said Vermont Central Railroad Company have purchased for the purpose of running, working, or repairing said roads; and that they be ordered to allow your orator forthwith to receive all tolls, fares or other lawful income, receivable for the use of the said railroads, and pay therefrom all reasonable expenses, for running or working said railroads, and of making all such repairs of each of said railroads, or any building or structures connected therewith, or used therefor, and the cost of all such engines, cars and other furniture as may be necessary during the time or times your orator shall work or run said roads, and apply the residue of such receipts in and towards the payment of all rent now due, or which may

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by themselves, or by trustees appointed under them, managed and run that road, in connection with the Vermont Central railroad, down to the date of the bill; that the cost of the construction of the orators' road, prior to June 1st, 1854, was \$1,350,000, upon which the rent reserved, being \$108,000 annually, had been paid to the orators by the Vermont Central company, or their trustees, up to and inclusive of the rent falling due June 1st, 1864; but that no rent had been paid since that time, notwithstanding the same had been frequently demanded by the orators both of the Central company and their trustees hereinafter mentioned; that in October, 1851, the Vermont Central company issued its obligations or bonds to the amount of \$2,000,000, dated Nov. 1st, 1851, and payable in ten years from date, with interest semi-annually, at seven per cent., and in order to secure the payment thereof, on the same day executed a mortgage of their road, franchises and personal property to three persons in trust for such bond-holders; that, at the time of bringing this bill, the defendants, John Smith, William Raymond Lee, and John S. Eldridge, held the position of trustees under said mortgage, and that the defendants, William Sobier and several others named in the bill, were holders of the bonds secured by that mortgage, and were made parties to this proceeding to represent such holders; that on the 28th of June, 1852, the Vermont Central Railroad Company, by deed duly executed, surrendered possession of all the property and franchises conveyed in the last mentioned mortgage, to the trustees therein named, for the purposes therein mentioned, with a proviso in such deed of surrender that the trustees might deliver back such property and franchises, whenever in their judgment the interests of the bondholders would permit, and that the trustees accepted such surrender and took possession of the property, and had continued in the possession and management thereof down to the date of the bill; that since the failure to pay the rent due the orators on the 1st of December, 1854, they had requested the said trustees to surrender to them the possession of the two railroads under their charge, together with the personal property used on and in connection with the same, in accordance with the agreements between the Vermont Central company and

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The bill also set forth the issue by the Vermont Central company of other bonds, and the execution by them of a second mortgage, to secure the same, to certain trustees, who were named in the bill.

The prayer of the bill was "that the said Vermont Central Railroad Company, and the said trustees, Smith, Lee and Eldridge, be ordered and decreed by the court to pay to your orator forthwith the amount of the rent so reserved and due, and payable to your orator on the 1st day of December, A. D. 1854; and that in the meantime, and until such rent is paid to your orator, that the said Smith, Lee and Eldridge be ordered to allow your orator to enter and take possession of, and use and run the Vermont and Canada railroad and the Vermont Central railroad, with all lands, depots and other property, rights and privileges now owned and enjoyed by your orator or the said Vermont Central Railroad Company, and used by the said trustees, Smith, Lee and Eldridge, in connection with, or for the purpose of running or working said railroads, and all engines, cars, tools, machines, machinery, equipment and other personal property, now in possession of said trustees, and used by them in connection with, and for working, running, or repairing said railroads, or managing the business thereof, and which the said trustees, or any of them, received or now hold under such deed of trust or deed of surrender as aforesaid, or which they or the said Vermont Central Railroad Company have purchased for the purpose of running, working, or repairing said roads; and that they be ordered to allow your orator forthwith to receive all tolls, fares or other lawful income, receivable for the use of the said railroads, and pay therefrom all reasonable expenses, for running or working said railroads, and of making all such repairs of each of said railroads, or any building or structures connected therewith, or used therefor, and the cost of all such engines, cars and other furniture as may be necessary during the time or times your orator shall work or run said roads, and apply the residue of such receipts in and towards the payment of all rent now due, or which may

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become due while your orator has the possession of said roads ; and that the said Smith, Lee and Eldridge, and all persons acting by or under their authority in or about the working of the said roads, or the repairing of the same, or the collection of the tolls thereof, be enjoined by order of this court from running, working or repairing said roads, or using or possessing the cars, engines, equipment or other personal property now used in connection with, or for running, working or repairing said roads, or managing the business thereof, and from receiving or collecting any tolls, fares or profits or earnings of said railroads, receivable for business done on such roads after this date, except as they may be authorized so to do, by the authority, direction and consent of your orator, and that your orator may hold possession of said roads, and run, work and repair the same, and manage the business thereof, and receive the earnings thereof, and pay out and disburse such earnings pursuant to the aforesaid indentures between your orator and the Vermont Central Railroad Company, or upon such other terms, and in such manner, for such purposes, and upon such conditions as to this court shall seem just. Or else, if it should not seem fit to the court to make such order; then that this court appoint some suitable and responsible person or persons to be the receiver or receivers and the manager or managers of the said Vermont and Canada and Vermont Central railroads, and all of the real and personal property now in the hands of said Smith, Lee and Eldridge, trustees as aforesaid, and used by them in running, working and repairing said roads, and in the execution of their said trust to run and work and repair said railroads, and receive all the earnings and make all needful repairs, and manage all the business of the said roads, and pay out of said earnings for all needful expenses, and to do all other things proper and necessary to be done, in carrying on and managing the business of the road, and subject to such orders, directions, conditions, limitations and terms as this court shall deem proper and necessary to secure the rights of your orator, and of all other persons interested in the same ; and that this court may make such further order and decree in the premises as to the appointing of a receiver or manager, or receivers, of the earn-

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ings of said railroads and property, as to the court shall seem fit, and that your orator may have such further or other relief in the premises as justice and equity may require.

And your orator further prays, that the said defendants, and each of them, their and each of their servants, agents, workmen and attorneys and all other persons acting under them, or either of them, be immediately restrained by order of this court, and until further direction of the same, in that behalf from in any manner hindering, molesting or interfering with your orator, its servants and attorneys, in the taking of the possession under said indentures of the said roads, and other real estate, rolling stock, fixtures, machinery and other things, personal or real, to the said roads or either of them appertaining, or used in the business thereof, or by the said Smith, Eldridge and Lee held or used under their said alleged trust, and from receiving or discharging any of the rents, profits or income of the matters aforesaid."

The answers of the Vermont Central Railroad Company, and of the trustees under the first mortgage of that company's property, admitted the legality and binding force of the indentures set forth in the orator's bill, so far as they were designed to lease the property of the orators therein described, and to give security upon the earnings of the roads for the payment of the stipulated rent. They denied the right of the orators to possession of the roads and property under the indenture of July 9th, 1850, claiming that to that intent it was illegal and invalid. They also denied the correctness of the claim of the orators as to the amount of the cost of constructing the Vermont and Canada road, insisting that such cost was much less than the amount stated in the bill.

The answer of the defendant Sohier set forth "that by the original act of incorporation of said Vermont and Canada Railroad Company, which was approved and took effect October 31st, 1845, and which (with the exception of that portion which required the railroad to pass across the sand bar to South Hero,) was in full force at the time of the execution of the several agreements or indentures, between that company and the Vermont Central Railroad Company, was authorized (among other

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become due while your orator has the possession of said roads ; and that the said Smith, Lee and Eldridge, and all persons acting by or under their authority in or about the working of the said roads, or the repairing of the same, or the collection of the tolls thereof, be enjoined by order of this court from running, working or repairing said roads, or using or possessing the cars, engines, equipment or other personal property now used in connection with, or for running, working or repairing said roads, or managing the business thereof, and from receiving or collecting any tolls, fares or profits or earnings of said railroads, receivable for business done on such roads after this date, except as they may be authorized so to do, by the authority, direction and consent of your orator, and that your orator may hold possession of said roads, and run, work and repair the same, and manage the business thereof, and receive the earnings thereof, and pay out and disburse such earnings pursuant to the aforesaid indentures between your orator and the Vermont Central Railroad Company, or upon such other terms, and in such manner, for such purposes, and upon such conditions as to this court shall seem just. Or else, if it should not seem fit to the court to make such order; then that this court appoint some suitable and responsible person or persons to be the receiver or receivers and the manager or managers of the said Vermont and Canada and Vermont Central railroads, and all of the real and personal property now in the hands of said Smith, Lee and Eldridge, trustees as aforesaid, and used by them in running, working and repairing said roads, and in the execution of their said trust to run and work and repair said railroads, and receive all the earnings and make all needful repairs, and manage all the business of the said roads, and pay out of said earnings for all needful expenses, and to do all other things proper and necessary to be done, in carrying on and managing the business of the road, and subject to such orders, directions, conditions, limitations and terms as this court shall deem proper and necessary to secure the rights of your orator, and of all other persons interested in the same ; and that this court may make such further order and decree in the premises as to the appointing of a receiver or manager, or receivers, of the earn-

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ings of said railroads and property, as to the court shall seem fit, and that your orator may have such further or other relief in the premises as justice and equity may require.

And your orator further prays, that the said defendants, and each of them, their and each of their servants, agents, workmen and attorneys and all other persons acting under them, or either of them, be immediately restrained by order of this court, and until further direction of the same, in that behalf from in any manner hindering, molesting or interfering with your orator, its servants and attorneys, in the taking of the possession under said indentures of the said roads, and other real estate, rolling stock, fixtures, machinery and other things, personal or real, to the said roads or either of them appertaining, or used in the business thereof, or by the said Smith, Eldridge and Lee held or used under their said alleged trust, and from receiving or discharging any of the rents, profits or income of the matters aforesaid."

The answers of the Vermont Central Railroad Company, and of the trustees under the first mortgage of that company's property, admitted the legality and binding force of the indentures set forth in the orator's bill, so far as they were designed to lease the property of the orators therein described, and to give security upon the earnings of the roads for the payment of the stipulated rent. They denied the right of the orators to possession of the roads and property under the indenture of July 9th, 1850, claiming that to that intent it was illegal and invalid. They also denied the correctness of the claim of the orators as to the amount of the cost of constructing the Vermont and Canada road, insisting that such cost was much less than the amount stated in the bill.

The answer of the defendant Sohier set forth "that by the original act of incorporation of said Vermont and Canada Railroad Company, which was approved and took effect October 31st, 1845, and which (with the exception of that portion which required the railroad to pass across the sand bar to South Hero,) was in full force at the time of the execution of the several agreements or indentures, between that company and the Vermont Central Railroad Company, was authorized (among other

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things) to build a railroad with a single or double track, from some point in Highgate, on Canada line, thence through the village of St. Albans, to some point or points in Chittenden county, most convenient for meeting a railroad to be built on the route described in the act to incorporate the Vermont Central Railroad Company.

And also, to extend a road from any point on the aforesaid route, to some point on the western shore of Grand Isle county, passing across the sand bar to South Hero, as the said company might thereafter designate.

The said original act of incorporation, containing no other provisions, restrictions or directions relative to the place where said railroad should be located, or the route upon which the same should be built, and no provisions, restrictions or regulations, concerning the running of trains upon said road, by the said Canada company, its lessees or assigns; but leaving the location of said railroad, within the limits aforesaid, and the manner and times of running trains thereon, and the general control and management of said road wholly to the discretion of said company, subject only to the general laws of the state.

That, in and by said original act of incorporation, it was expressly declared and enacted, as follows :

SEC. 2.—If said corporation shall not, within five years, complete the survey of said road, and within seven years from the passage of this act, construct and finish and put in operation, one fourth part of said road, and within ten years from the passage of this act, construct and put in operation one-half of said road, and shall not within twelve years from the passage of this act, complete and put in operation the whole of said road, then the rights and powers, granted by this act, shall cease for such parts of said road as shall not be completed within the several periods aforesaid, but shall be valid for such parts of said railroad as shall be completed within the said periods respectively.

And that in and by said agreement or indenture, between the said Vermont Central and Vermont and Canada Railroad Companies, of August 24th, 1849, said Vermont and Canada company expressly stipulated, covenanted and agreed to construct

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and finish its said railroad, in conformity with the provisions and requirements of said act of incorporation, and to do and complete all arrangements and things in a proper and legal manner, so that the right and title of said company to said road and to the use of it, should be clear and unquestionable.

And especially undertook, covenanted and agreed, that the road should be so built, constructed and located by them as to entitle and give to the Vermont Central Railroad Company, the full, sole and undisputed right to the use and enjoyment of the same, and the control of traffic thereon, subject only to the requisition of their said charter, in such manner as that between the extreme termini mentioned therein, no competition by railroad could by possibility exist, adverse to the interests of said Central company or this defendant; and your respondent avers, that the foregoing stipulations and covenants on the part of the Vermont and Canada company, was the only consideration for, or on account of which said contract was ever made or contemplated by the Vermont Central Railroad Company.

And this defendant, further answering, saith, that the aforesaid stipulations, covenants and agreements of the said Vermont and Canada company, constituted a material and important part of the consideration for the covenants, and agreements of said Vermont Central company, contained in said several agreements and indentures, set forth in said bill of complaint.

And this defendant believes, and so avers the fact to be, that said Central company executed said agreements or indentures relying upon the performance of said covenants, and agreements so made and entered into by the Vermont and Canada company contained in said indentures, and supposing that said Vermont and Canada company would, within the period specified in said act of incorporation, complete and finish its said railroad, meeting the railroad to be thereafter built upon the route described, in the act to incorporate the Champlain and Connecticut Railroad Company, at the village of Burlington, and connecting said last mentioned railroad with the Canada line, in the town of Highgate, and would in all other respects, comply with the provisions of its said charter.

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This defendant further saith, that the railroad on the route described in the charter of said Champlain and Connecticut River Railroad Company, (now by change of name called Rutland and Burlington Railroad Company,) was built, completed and put in operation as early as 1850, or thereabouts, and has ever since been, and still is in operation.

That the time limited, in and by said act of incorporation of said Vermont and Canada company, for the building and completion of its said railroad, connecting said Champlain and Connecticut road, (now called Rutland and Burlington railroad,) with Canada line, as aforesaid, has long since elapsed; that said Vermont Central Railroad Company, as this defendant is informed and believes, long before the expiration of the time limited for that purpose, by said act of incorporation, to wit: in or about March, 1854, expressly requested said Vermont and Canada company to complete its said road according to the requirements of its said charter, and the express stipulations and covenants of said Vermont and Canada company, contained in said indenture of August 24th, 1849; and that the said last named company, without any just or legal cause whatever, has hitherto wholly and wilfully neglected and refused to build its said road, to any point in the village of Burlington, or in any manner to connect the same with said railroad so built upon the route described, in the charter of said Champlain and Connecticut River Railroad Company as aforesaid, nor has the said Vermont and Canada company extended or constructed its road to any point on Canada line.

This defendant further saith, that the said Vermont and Canada company, having thus neglected and refused to build its said railroad, connecting the said Rutland and Burlington railroad with the Canada line, made application, as this defendant is informed and believes, to the legislature of Vermont at its regular session, in 1858, for an alteration or amendment of said charter; and thereupon it was enacted by said Legislature, as follows:—

“SEC. 1. Section two of the charter of the Vermont and Canada Railroad Company, approved October 31, A. D., 1845, is hereby so amended that it shall read as follows: “If said company shall not, within five years, commence the construction of the road, and shall not, within seventeen years next after the

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31st day of October, A. D., 1845, complete and put in operation said road, from a point in the village of Burlington most convenient to connect at said village of Burlington with the railroad running southerly from said village, now called the Rutland and Burlington railroad, connecting such southerly road, by a line of said Vermont and Canada railroad running from the most convenient point of connection in said village of Burlington, with said Rutland and Burlington railroad, to some point west of the town house in the town of Colchester; and thence to connect with the present track of the Vermont and Canada railroad, at the most suitable and proper point in the town of Milton; thus connecting said southern line, as well as the Vermont Central line, by the most convenient and direct route, with the northern terminus of said Vermont and Canada Railroad,—then this corporation shall cease and the charter thereof be void.”

SEC. 2. The foregoing amendment of said charter, and the extension of four years beyond the time originally given by said charter for the completion of said road, is granted, upon the express condition that said company conform to and obey the following requisitions and provisions, as well as the other provisions of this act, namely:—“ That said company shall, within nine months after the passage of this act, survey and locate that part of its line mentioned in section one of this act not already built, according to the true intent and meaning of this act, and expend in the construction thereof, upon such location north of Onion River, fifty thousand dollars before the first day of September, A. D., 1859, and fifty thousand dollars more upon said line so located within eighteen months from the passage of this act; that said company shall, within four years from the 31st day of October, A. D., 1858, complete and put in operation the same, so as to make one continuous line of said road from such point of connection in the village of Burlington, to the northern terminus of the Vermont and Canada railroad; that said road when so completed shall be forever run and operated over said extension, so as to put said Rutland and Burlington railroad upon an equal footing in respect to the convenient transmission of freight and passengers, and the charges therefor, over and upon said Vermont and Canada railroad, each way and in connection

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therewith, with the Vermont Central line, subject in case of disagreement to the decisions of the commissioners mentioned in the fifteenth section of the charter of the Vermont and Canada Railroad Company; that all passengers passing from Burlington over the extension hereby ordered to be built, and over said Vermont and Canada railroad to the northern terminus of the last named road, or to any intermediate station, and all passengers passing over the same roads from said northern terminus or from any of said intermediate stations to said Burlington, shall be carried without delay and without change of cars, except in case of accident or other casualty; that until said Vermont and Canada railroad shall connect with said Rutland and Burlington railroad, as hereinbefore provided, said Vermont and Canada railroad shall, so far as it has or hereafter may have the legal right, without impairing any of its present legal rights or obligations to those which may arise from present obligations, give to the said Rutland and Burlington the same rights, privileges, and advantages to and from Burlington, over the Vermont Central railroad to and from Essex Junction, and thence over the Vermont and Canada railroad to and from Rouse's Point, as is conferred upon said Rutland and Burlington line, by the name of the Champlain and Connecticut River Railroad Company, over said Vermont and Canada railroad, by the fifteenth section of the act incorporating said Vermont and Canada Railroad Company, and, in case of disagreement, all questions in relation thereto shall be determined by commissioners and the supreme court on their report, according to the provisions of said fifteenth section."

SEC. 3. If said Vermont and Canada Railroad Company shall not, by a legal vote of its directors, duly passed and filed with the Secretary of State, accept this act within forty-five days next after the passage thereof, or if it shall fail to perform and fulfill all the requirements, conditions, and provisos of this act, in either case said company shall take no benefit of any of the provisions thereof.

SEC. 4. This act shall take effect from its passage.

Approved, November 18, 1858."

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Which said act having been approved by the Governor of Vermont, on the 18th of November, 1858, was afterwards, and within forty-five days next after its passage, as this defendant is informed and believes, duly accepted by said Vermont and Canada Railroad Company, in the manner provided by the third section of said act, and thereby became, was and still is in force, and binding upon the company.

This defendant further saith, that the said Vermont and Canada company has not complied with, or performed any of the conditions or requisitions of the second section of said last mentioned act, although the time for the performance of some of said conditions and requirements has elapsed, and that by reason of such neglect of said company, its charter is forfeited.

And this defendant insists, that by reason of the neglect of the said Vermont and Canada company, to build and complete its road, so as to meet said Rutland and Burlington railroad, in the village of Burlington, and to connect the same with the Canada line in Highgate, within the time specified, in said original act of incorporation of said Vermont and Canada company, and in accordance with the covenants of said company contained in said indentures; and also, by reason of the passage and acceptance of said act of 1858 as aforesaid, and the non-performance of the conditions contained in the second section of said last mentioned act, the said Vermont Central company has been, and is now wholly absolved and discharged from all legal or equitable duty or obligation, to perform any of the covenants or agreements on its part, contained in said indentures; that said indentures or agreements have become and are utterly null and void, and that the said Vermont and Canada company has no claim, right or lien to, in or upon any of the property of said Central company.

That the consideration for the making of said indentures or agreements, by said Central company, has wholly failed from the acts and omissions of the Vermont and Canada.

That the execution of said covenants and agreements, according to the true intent and meaning of the parties, has become and is impossible, through the aforesaid acts and omissions of the Vermont and Canada company.

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That the Canada company has not, in fact, granted or demised, or conveyed, nor can it grant or demise to the Central company, the rights and privileges which it, the Vermont and Canada, undertook, and guaranteed to grant and demise; and that it is utterly inconsistent with the principles of equity and good conscience, as administered by this honorable court, to hold or adjudge the Central company bound by said contracts or agreements.

That the conditions precedent for the making of said contract, to be performed by the Canada company, have not been performed, and that the aforesaid company has now accepted a new charter, by the effect of which it is unable to grant or demise to the Central company, those rights or privileges, which by said contract or agreement, it undertook to grant and demise, and for the possession of which alone, the Central company made said contract.

These answers were all traversed, and testimony was taken on both sides. Before the final hearing of the cause before the chancellor, receivers were appointed by the court, who took possession of the two roads and property in question, and managed the same under the direction of the chancellor.

It appeared that the following act was passed by the Vermont legislature, at the October session, 1858.

“SEC. 1. In case the Vermont and Canada Railroad Company shall omit to accept the act entitled, “An act in addition to and in amendment of an act entitled ‘An act to incorporate the Vermont and Canada Railroad Company,’ approved October 31, 1845,” within the time prescribed by said act; or in case the same shall be accepted, as in said act provided, and said Vermont and Canada Railroad Company shall fail to comply with the provisions of said act by the times therein prescribed, and its charter shall thereby become forfeit,—it shall be lawful for the receivers and managers of said road to continue to operate the same until the first day of January, A. D. 1860, and until otherwise provided, under the direction of the chancellor having jurisdiction of the suit in chancery in which said receivers and managers were appointed, who may require such persons to give bonds for the faithful management of said property, and for a

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faithful accounting for all the earnings of said road, and may order and direct such persons to account from time to time to said chancellor as he may direct: *provided*, nothing in this act shall be construed to give effect to the same, only in the event of the forfeiture of the charter of the said company.

SEC. 2. The said chancellor shall have power to order such persons to give to the Rutland and Burlington railroad such business connections and facilities for freight and passengers as to him may appear just and equitable.

Approved Nov. 25, 1858."

Among other facts disclosed by the testimony, it appeared on the 25th June, 1850, the following notice was published in certain newspapers, in accordance with the by-laws of the company regulating such notices, viz :

"VERMONT CENTRAL RAILROAD COMPANY.

"A special meeting of the stockholders is hereby called, at Windsor, Vt., on the 9th day of July next, at two o'clock P. M., for the purpose of acting on a lease of the Vermont and Canada railroad, and the other arrangements connected therewith.

By order of the Directors,

E. P. WALTON, JR.,

Clerk Vt. C. R. R. Co."

That a meeting was held in pursuance of this notice, at which the indentures dated August 24th, 1849, January 11th, 1850 and July 9th, 1850, were read, and the following vote was then unanimously adopted:

"*Voted*, That the contract which has just been read in reference to the leasing of the Vermont and Canada railroad, and the other arrangements connected therewith, be, and hereby is approved by the stockholders, and that the President, in behalf of the corporation, be authorized to sign the same, and affix the seal of the corporation."

At a previous meeting of the stockholders of the Vermont Central Railroad Company, held on the 24th of August, 1849, it was voted "that the Vermont Central Railroad Company does duly accept the act of the legislature of Vermont, approved

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November 6th, 1847, entitled 'An act in relation to railroads.' "
(Acts of 1847, No. 22, page 18.)

The portion of this act material to the points involved in this case, is as follows :

"All railroad companies incorporated, or which may be incorporated, under the authority of this State, shall have power to make contracts and arrangements with each other, and with railroads of other States, for leasing or running their roads or any part thereof, * * * * and also to purchase and hold such personal property as shall be necessary and convenient for carrying into effect the object of this act."

The authority of the Vermont and Canada company, on its part, to enter into the contracts of lease, &c., set forth in the orator's bill, was not denied by the defendants.

It further appeared that at the session of the legislature of Vermont held in October, 1859, the following act was passed :

"SEC. 1. Section two of the charter of the Vermont and Canada Railroad Company, approved October 31, A. D. 1845, is hereby so amended that it shall read as follows :

"If said company shall not within five years commence the construction of the road, and shall not within eighteen years next after the 31st day of October, A. D. 1845, complete and put into operation said road, from a point in the village of Burlington most convenient to connect, at said village of Burlington, with the railroad running southerly from said village, now called the Rutland and Burlington Railroad, connecting such southerly road by a line of said Vermont and Canada railroad, running from the most convenient point of connection in said village of Burlington with said Rutland and Burlington railroad, and thence to connect with the present track of the Vermont and Canada railroad at the most suitable and proper point, thus connecting said southern line, as well as the Vermont Central line, by the most convenient and direct route, with the northern terminus of said Vermont and Canada railroad, then this corporation shall cease, and the charter thereof be void.'

"SEC. 2. The foregoing amendment of said charter and the extension of five years beyond the time originally given by said charter for the completion of said road, is granted upon the

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express condition that said Vermont and Canada Railroad Company shall accept, conform to, and fulfill the following requisitions and provisions, as well as all the other provisions of this act, namely :

“ That said company shall, within eighteen months after the passage of this act, construct and finish a railroad from the most convenient point of connection on the lake shore in said village of Burlington, with said Rutland and Burlington railroad, thence northerly and easterly through the sand bank so called, as near as practicable on the route of the Vermont Central railroad, as originally surveyed and partly worked, to a point of junction with the present line of the Vermont Central, at or near the railroad bridge, at Winooski, over the Winooski river, and that said company shall within five years from the thirty-first day of October, 1858, complete, and put in operation its road, so as to make one continuous line of said road, from such point of connection in the village of Burlington, to the northern terminus of the Vermont and Canada railroad: that said road, when so completed, shall be forever run and operated over said extension, so as to put said Rutland and Burlington railroad upon an equal footing in respect to the convenient transportation of freight and passengers, and the charges therefor, over and upon said Vermont and Canada railroad, each way, and in connection therewith, with the Vermont Central line, subject, in case of disagreement, to the decision of the commissioners mentioned in the fifteenth section of the charter of the Vermont and Canada Railroad Company: that all passengers passing from Burlington over the extension to be built, and over said Vermont and Canada railroad, to the northern terminus of the last named road, or to any intermediate station, and all passengers passing over the same roads, from said northern terminus or from any of said intermediate stations, to said Burlington, shall be carried without delay, and without change of cars except in case of accident or other casualty; that all passengers passing from Burlington over any part of the line of said Vermont and Canada railroad, or over the Vermont Central railroad, to Northfield, or to any station intermediate between Northfield and Burlington, and all passengers passing from Northfield, or from any station

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intermediate between Northfield and Burlington, to said Burlington, shall, whenever and so long as the Vermont and Canada Railroad Company, or any officer, corporation or person claiming or holding through, or under, or in the right of the said Vermont and Canada Railroad Company, shall have the possession, control or direction of the Vermont Central line, or the running of trains thereon, between said Northfield and Burlington, be carried without change of cars, except in case of accident or casualty, and without unnecessary delay; that until said Vermont and Canada railroad shall connect with said Rutland and Burlington railroad, as hereinbefore provided, said Vermont and Canada railroad shall, so far as it has, or hereafter may have, the legal right, give to the said Rutland and Burlington the same rights, privileges and advantages to and from Burlington, over the Vermont Central railroad to and from Essex Junction, and thence over the Vermont and Canada railroad, to and from Rouse's Point, as is conferred upon said Rutland and Burlington line, by the name of the Champlain and Connecticut River Railroad Company, over said Vermont and Canada, by the fifteenth section of the act incorporating said Vermont and Canada Railroad Company, and in case of disagreement, all questions in relation thereto, shall be determined by commissioners, and the Supreme Court on their report, according to the provisions of said fifteenth section.'

"SEC. 3. The act entitled 'an act to incorporate the Vermont and Canada Railroad Company,' approved October 31st, 1845, and the several acts in amendment of, or in addition to, the same, shall at all times be subject to the control of the General Assembly, and may be altered, amended, modified or repealed, as the public good may require.

"SEC. 4. If said Vermont and Canada Railroad Company shall not, by a legal vote of its directors, duly passed and filed with the Secretary of State, accept this act, within six months next after the passage thereof, or if it shall fail to perform and fulfill all the requirements, conditions and provisions of this act, in either case said company shall take no benefit of any of the provisions thereof.

"SEC. 5. This act shall take effect from its passage."

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The cause was referred to special masters to ascertain and report the cost of the construction of the Vermont and Canada Railroad, together with the incidental expenses of that company, and the amount of rent in arrear due them. In the masters' report they stated that in April, 1857, the two corporations having previously been unable to agree upon the amount of the cost of such construction, committees from the two companies met, and after consultation agreed to compromise their differences by having the Vermont and Canada acknowledge itself indebted to the Vermont Central company in the sum of thirty-two thousand six hundred and seventy two dollars and fifteen cents, and this agreement was subsequently in April, 1857, sanctioned by the votes of both boards of directors. The masters further reported in reference to this claim as follows :

"There was no examination of the accounts of either company, but the sums above stated were respectively agreed upon solely by way of compromise. There was no evidence tending to show how, when, or for what purpose that sum of thirty-two thousand six hundred and seventy-two dollars and fifteen cents, acknowledged to be due from the Vermont and Canada to the Vermont Central company, accrued, or that it had any connection with the building of the Vermont and Canada road, or the incidental expenses thereof. For the conditions and details of that settlement and compromise, we refer to the testimony of Levi Underwood and John G. Smith, taken in this case and hereto attached, and we find the statements therein made to be true.

For want of evidence to prove that any such indebtedness actually existed against the Vermont and Canada company, and, if it existed, to prove that it could properly be charged to the building of the Vermont and Canada road, or the incidental expenses thereof, we have disallowed the item."

The cause was heard at the April term, 1860, before POLAND, CHANCELLOR, who rendered a decree for the orators, in accordance with the prayer of the bill, and ordered that the two roads be kept in the hands of the receivers, and subject to the control of the court.

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The decretal order proceeded as follows :

" Let a decree therefore be entered for the orators in accordance with the prayer of their bill ; and that they are entitled to receive rent upon the basis found and reported by the masters ; and also that they are entitled to the amount of rent in arrear as reported by them, and also to future rents semi annually on the same basis. The orators are also decreed their costs in the cause. The said receivers are also ordered, on their accounts being properly settled and passed, to pay over whatever sum may be in their hands to the orators in satisfaction of said rents so far as the same will be sufficient, and have satisfaction entered to that extent ; all sums which have been advanced to the orators under orders from the Chancellors, or otherwise, to be applied and accounted for by the orators as payment towards said rents at the dates of such payment. It is further ordered that said road and property remain in the hands of said receivers, Lawrence Brainard, Joseph Clark and John Gregory Smith to run, manage and control the same under the direction of the court as heretofore, and to pay over from time to time as the same may accrue, the proceeds and earnings of said property to the orators, until their claim for rents as established by this decree shall be fully paid together with their costs in this cause. And it is ordered that said receivers on the first day of January and July of each year, or as soon thereafter as may be, make a report to the court, verified by the oath of a majority of them, of the earnings of said roads, the cost of operating and keeping the same in repair, including their own charges and expenses, and generally the condition and state of the property ; and also the amount and date of all payments made to the orators, under this decree, and to hold said property and funds arising therefrom at all times subject to the order and direction of the court."

From this decree both parties appealed.

George F. Edmunds and *Lucius B. Peck*, for the orators.

I. Were the indentures set forth in the bill binding on the two corporations ?

a. The statute of 1847, (act of November 6th, 1847,) answers

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the question so far as the corporations as such, and the public are concerned.

b. But it may be said that as this was an arrangement not contemplated in the charter of the Central, the Legislature could not thus enlarge the powers of the corporation so as to bind any stockholders who did not assent thereto.

All this *may* be true, and not at all touch the question in this case, for where the *law* authorizes the corporation to do the act, the *sole* right of objection resides in the stockholders *individually*, and until by proper proceedings they do object, the corporation cannot set up such a defence.

A corporation cannot, any more than an individual, repudiate an act which the law has allowed it to do. See note, Red. on R., 581; id. ch. 24.

c. The act being lawful, whoever had a right to object to the arrangement, was bound to do so, immediately upon the contract being made;—even from stockholders, in such a case, the law requires *active diligence* if they seek to oppose such acts.

This contract then, having been carried into execution, and the road built and used by the Central company and the trustees, under this contract, *and even now held under it*, and recognized in every conceivable way; it is now quite too late to set up any such fraudulent defence. 9 Mass. 423, *Little v. O'Brien*; 16 Mass. 102, *Chester Glass Co. v. Dewey*; 7 Met. 275, *Quincy Canal v. Newcombe*; 3 Cond. Ch. 52, *Gray v. Champlin*; 2 Atk. 41, *Elliott v. Merryman*; 6 E. L. & E. 182, *Graham v. Birkenhead R. Co.*; Story Eq. 1520. Red. on R. 510.

II. It is claimed that the fact that the Canada road has not been built into Burlington and to Canada line in Highgate, furnishes a complete defence to this suit. In other words, that the defendants may keep possession of the orator's property and refuse to pay for its use, and thus deprive the orator of the ability to finish its road, and then make use of such fact as an *equitable* defence to the suit! The answers to this extraordinary proposition are numerous.

a. So far as the fact that the charter of the orator is in danger of forfeiture, is included in this point, it may be disposed of in a word.

1. It is not yet forfeited, but is valid.

2. No one but the *State* can take advantage of a forfeiture, should one occur, and hence had the charter actually expired, it would be no defence. 24 Vt. 228, *Brandon I. Co. v. Gleason*; Ang. & A. on Corp., s. 777 & n.

3. There is no certainty or probability that the charter will be forfeited; the history of legislation is pretty full evidence that the state will only insist on just and proper performance.

b. As to this clause in the charter viewed under the contract:

1. By the instrument of August 24, 1849, the Canada was to be built on such location as should be approved by the Central, or their agent. The Essex location was made and approved. No location has ever been made of the branch to Burlington.

2. The demise is only of the Canada, "as the same is now located or as the same shall be hereafter located and constructed," with all the rights of the Canada under its charter "or any additions to be made thereto."

3. But if it could be open to any question on the contract of August 24, 1849, as to what the parties intended, the contract of July 9, 1850, certainly leaves it clear.

It is there stated that the true meaning of the articles, is that when the Canada shall have finished its road agreeably to the contract, it shall have no further right to expend money on it. And that "in accordance" therewith, the Canada "have caused the road to be located and graded," &c., all with the knowledge and to the acceptance of the Central, and that when such work should be finished, &c., it should be an acceptance under the contract. All this relates only to the line to Essex, and clearly shows that, that (it being built,) was all the Canada was bound to do.

III. As to the claim set up in Sohler's answer relating to the effect of the legislation of 1858 and 1859:

We submit that it has no effect upon the rights of the Canada in this suit.

a. As has been before mentioned, the charter of the Canada required that a connection should be made with the Rutland and

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Burlington railroad and the lease contemplated that "*additions*" might be made to the charter.

b. And the lease, in view of this, expressly provided that, "in case it shall hereafter become *necessary* for the Vermont and Canada Railroad Company, in order to comply with the requisitions of their charter, to extend their road into the village of Burlington, or to any other point or points by any route now located or *which may be hereafter located*," the Canada shall lease such extension to the Central, &c.

Thus there was no obligation to locate or build the extension in any particular place, or *within any particular time*. All this was left to such arrangements as the Canada might make with the legislature; but when the Canada should at last be driven to it, the Central should take and control and pay for the new line.

c. In this state of things the acts of 1858 and 1859 were passed, but it is only needful for us to consider the act of 1859, as that took the place of the act of 1858.

That act grants an extension of time for the building of the extension, and requires the Canada to begin and build on a certain route, for a short distance.

This surely cannot be claimed as in any way injurious to the defendants.

The state in fixing to a certain extent, the route, exercised its right of eminent domain in designating the private property which might be taken; and it does not appear that this route is not the one the Canada would have chosen; and in pursuance of the very terms of the lease the Central has approved it.

d. But suppose even, that the effect of this legislation is such that the defendants would not be *bound* to accept and pay rent upon this new line. It is apparent from the lease and the action under it, that this matter of the extension was a wholly contingent and independent matter, having nothing to do with the rights of the parties as to the existing line. It was regarded as an evil which was to be evaded, postponed and modified on the part of the Canada, as long and as much as possible. It is, therefore, wholly premature to consider what *may be* hereafter the rights and duties of the parties in regard to it.

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VI. It is claimed that this contract and pledge cannot operate upon the rolling stock, &c., acquired by the Central and trustees from the income of the roads, but that the solē security of the orator is upon that stock *in esse*, at the date of the contract.

a. The language of the instrument covers it. It is of all property used in running the roads, &c., that the orator may take possession.

The subsequent incumbrances are made expressly subject to this right, and were accepted so by the defendants, and under which they now hold possession.

Such property would, in equity, be the subject of assignment or mortgage; Story's Eq. 1040, 1055; but this case is much stronger; there is no attempt to pass a title, but only to contract for a specific thing to be done upon property in a certain condition at the time the event is to happen; and to this all parties have agreed. The technical rule of law does not therefore at all apply in any sense.

b. Again; as between the parties to this contract and their privies (which includes all the defendants) this species of property is a mere incident to and parcel of the general property, and may and should go with it in all transfers of the principal thing.

c. All these rights are mere trusts, and the only question is one of priority, and that, the instruments themselves settle. See, *Ludlow v. Hurd et al*, Law Register, June 1858, and cases cited; Red. on R. 576, n.; id. 589, 590; 82 N. H., *Pierce Emery, Stevens v. Buffalo and Corning R. Company* before JOHN-SON J.

VII. As to the sum on which rent is to be computed.

We claim that this cost is now, after the lapse of *ten years* since the work was begun, and after the lapse of *six years* before any question or objection was made by any of the defendants as to the amount of it, to be decided upon the general evidence of the acts of the parties while the work was going on, and at its substantial completion in the fall of 1852, and the spring of 1853, and therefore the cost is the sum of \$1,348,500, besides the sum agreed to be due to the Central in 1857, for work on the road not before paid for, being \$32,673 15.

It is a general principle of law and equity of universal application, that in the matter of the construction of executory agreements and the correctness and adjustment of accounts, the contemporaneous exposition by the parties to such contract and accounts, in the absence of fraud *establishes* the rights of all the parties and privies, and all claiming under them.

The trustees under the first mortgage knew that the work and its costs, and what was costs, *was a matter solely between the two corporations to regulate in their own way* (provided of course they did it in good faith,) and they must have known in what way it had been done from the first, and so, by force of the lease and the actual transaction, were as much bound by the *continuance thereafter of the same course of dealing* as they were by that which had already happened.

On the first of July, 1852, the trustees of the first mortgage took possession of both roads, and used the same, including the bridge &c., at Rouse's Point, *and paid the rent without objection, computed on the stock outstanding*, and so continued to do down to December first 1854.

As to the increased cost above \$1,348,500, found by the settlement of 1857;—we submit that it is perfectly manifest it ought to be added to that sum, because :

The two sole parties to those accounts "compromised" by the Central yielding the largest part of her claim, and by offsets on the part of the Canada, for materials, &c., thus *reducing* the building debt to the Central, to about \$32,000, and so *diminishing* the cost of construction below what it *really* was.

As to this settlement and judgment, we insist that, as the dealings were, by the original contract, solely a matter between the two companies, whatever adjusts them in good faith between the companies, concludes all collateral and subsequent parties. There cannot be one adjudication and one rule for the principal party to the lease, and another for its grantees. In all such cases the act of the principal must bind the accessory; 19 Vt. 410, *Porter v. Bank of Rutland*; 12 Vesey 354, *Morse v. Royal*; Powell on Mort., vol. 3, p 953, a.

Levi Underwood and Andrew Tracy, for the Vermont Central Railroad Company, and the trustees of the first mortgage.

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1. The validity and construction of the contract of July 9, 1850.

We do not at this time deny the power of a railroad corporation to pledge its tolls, in such a manner that a court of equity may enforce the application of them to the purposes of the pledge.

But we deny the right of a corporation to make a contract to forfeit its own existence, or put its control into the possession of another corporation.

Corporations created for particular purposes with limited powers, cannot by their own inherent contracting powers enlarge their charters and extend their business beyond the scope of their original charters.

If a corporation desires an increase of power or an enlargement of its business, it must seek it at the hands of the legislature from whom its powers were originally derived, and this must be assented to by all the stockholders individually.

So far as the contract of July 9, 1850, is a pledge of the tolls of the two roads to the payment of the rent of the orator's road under the lease, giving the orator a priority over other creditors, it may be upheld and the court may give it effect by lending its aid to ensure the application.

Beyond this we claim that it is entirely outside the chartered powers of either corporation and is not warranted by the act of 1847, authorizing leases. 6 E. L. & Eq. 106; 13 id. 506; 19 id. 513; 21 id. 319; *State v. B. C. & M. R. R. Co.* 25 Vt. 442-3; *Stevens v. R. & B. R. R. Co.*, pr. Bennett Chancellor; *Beatty v. Knowles*, 4 Pet. 152; Angell & A. on Corp. sec. 111, 536-7; *N. H. & Hartford Co. v. Croswell*, 5 Hill 383; *Providence Bank v. Billings et al.*, 4 Pet. 514; *Mayor of Norwich v. N. R. R. Co.*, 30 E. L. & Eq. 182; *Bustock v. N. S. R. R. Co.*, 32 E. L. & Eq. 101; *N. O. & J. & Gr. N. R. R. Co. v. Harris*, 27 Miss. 517; Redfield on Railways, p. 23, 399-400-1, note, 408, 116, 117, 576; *Livingston v. Lynch*, 34 J. Ch. 573.

2. What is the effect of the non-completion of the Vermont and Canada road upon the right of the Vermont and Canada to take possession of the two roads under the contract of July 9, 1850?

The lease provides that the Vermont and Canada company shall forthwith provide the necessary funds and proceed with all reasonable despatch to construct the Vermont and Canada rail-

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road, its fixtures and buildings, to settle and pay all land and other damages, and to do and complete all other arrangements and things in a legal and proper manner, so that their right and title to said road shall be clear and unquestionable. "It being understood and agreed that the several sections and portions of said Vermont and Canada road shall be constructed at such limitation of costs, within such time, on such location and in such a way and manner in all respects as shall be satisfactory to and be approved by the directors of the Vermont Central Railroad Company."

The second section of the orator's charter provides that "If the company shall not within five years commence the construction of the road, and shall not within thirteen years complete and put in operation said road connecting the roads to be built by the Champlain and Connecticut River Railroad Company, and by the Vermont Central Railroad Company, with Canada line, then this corporation shall cease and this act be void."

This is a condition precedent to be performed by the orator before it can claim that the Vermont Central shall lose the right to control its own property. And it must be performed before the orator can have the aid of a court of equity to enforce either a specific performance or a forfeiture.

We do not claim that the orator is not entitled to a fair compensation for the rent of its road which has been built, or that the charter has become *ipso facto* void by the omission to build the road as provided by the charter. But we insist that the omission to build has subjected the charter to forfeiture, and hence the right and title to said road is not "*clear and unquestionable*," and having by its own act incurred a forfeiture, it cannot ask a court of equity to deliver possession of the property in pursuance of a contract thus violated on its part, and allow it to execute the contract upon the part of the defendant.

If the property is ordered into the possession of the orator, as prayed for, this suit must end and the court lose its control over the property, and thus the party who first violated the contract is allowed to take upon itself the performance of its own covenants and those of the defendant without the supervision of the court. 3 Story Eq. Jur. sec. 771, 776; *Morgan's Heirs v. Morgan*, 4 U.

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S. Cond. 120 ; *Colson v. Thompson*, id. 143 ; *Barrs v. Lapsley et al.*, 3 id. 506 and note ; *King v. Hamilton*, 4 Pet. 311 ; *Milward v. Earl of Thanet*, 5 Ves. 720.

3. The property is charged with several successive trusts. And the court having taken charge of the administration thereof, ought to retain the case and continue the property in the hands of receivers, subject to the direction of the court for the protection and benefit of all parties in interest. Each party has a right to know how the property is managed and how the funds are disposed of, and this right can only be enforced in court.

It will be much better for the interest of all parties and more in accordance with the character of a court of equity to retain the control of the property and administer the trusts, than to turn the parties out of court, for the sake of having a new bill brought solely for the administration of the trust. When a court enters upon the administration of a trust it should continue until it is fully administered or the parties all agree amongst themselves.

4. The cost of the Vermont and Canada railroad.

The cost of the road as found by the masters upon which rent should be computed is \$1,251,227 73, and we insist that is the proper sum, and upon this basis no rent was due to the orator at the time of bringing this suit.

It is true, as claimed by the orator, that rent was paid upon the full amount of the capital stock of the Vermont and Canada Railroad Company, as the cost of the road, and it is not denied but that is evidence tending to show an agreement or understanding of those who made the payments that the stock represented the cost of the road.

But in this case the payments were made by agents and trustees, and are not entitled to the same force as in cases of such payments by individuals in their own behalf.

And as the evidence shows that some portion of the capital stock was expended for other purposes than the cost of the road, the case was properly referred to masters to ascertain the cost, and their report upon this matter is final unless they have received or excluded testimony wrongfully. The weight of the circumstances of payment upon the capital stock was to be judged of by them.

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5. Incidental expenses.

We insist that the defendants are not bound to pay these. The incidental expenses referred to in the lease and explained in the contract of July 9, 1850, are those expenses incident to operating the road and not the expenses which the orator may see fit to incur, for its own convenience.

Its expenses for keeping up its organization and making reports to the legislature and its legal expenses by way of advice and the prosecution of its claims and defence of suits, are not chargeable to the defendants under the lease. The orator covenants to keep up its organization and make all reports required by law, and this implies that it is to be done at the orator's expense.

The defendants are not bound to fight all the orator's battles under the lease.

6. If there was no breach when this suit was brought, then the non-payment of rent *pendente lite* is no ground for substantive relief under the bill, and most certainly furnishes no ground for ordering the property into the possession of the orator. Since the bill was brought, the property has been in the hands of the court, and beyond the power of the defendants, by the act of the orator.

It would be an anomaly in equity jurisprudence, if the orator could deprive the defendant by injunction and the appointment of a receiver, of the power to perform the conditions of a contract, which until then was not broken, and thus cause a breach for the purpose of sustaining his bill.

It is clear that there was nothing in arrear at the time this suit was brought, upon the basis of the cost of the road, upon which rent is to be computed, as reported by the masters.

The rent had been overpaid at that time.

This, at all events, would be a conclusive answer to the prayer for possession, and a reason why the custody of the property should be retained by the court for the administration of the trust.

The decree of the chancellor ought, therefore, to be affirmed.

Ira Perley and John M. Pinkerton, for the defendant Sohier.

I. The lease of August 24, 1849, was never a valid contract, and binding upon the parties,—certainly never upon the Vermont Central company.

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1. The charters of these corporations, as originally passed, never authorized any such agreement. 2 Cranch 128, *Had et al. v. Providence Ins. Co.*; 4 Wheat. 636, *Dartmouth College v. Woodward*; 12 Wheat. 64, *Bank of U. S. v. Danbridge*; 5 Pet. 152, *Beatty v. Fowler*; 13 Pet. 587, *Bank of Augusta v. Earle*; 9 How. 172, *Perrine v. Chesapeake & Del. Canal*; 27 Pennsylv. 339, 351, *Commonwealth v. Erie & N. E. R. Co.*; 27 Vt. 141, *Thorpe v. Rut. & B. R. Co.*; 31 Vt. 218-19, *Branin v. Conn. & Pas. Rivers R. Co.*

Such a contract is illegal and void, and cannot be enforced. 6 Eng. L. & Eq. 106, *Berman v. Bufford*; (See opinion of the court on pages 110, 111.) 13 Eng. L. & Eq. 359, *Simpson v. Denman*; 21 How. 442, *Pearse v. Peru & Indianapolis R. Co. and Madison & Ind. R. Co.*

Such must be the law in Vermont, or else there would have been no occasion for the act of Nov. 6th, 1847, or the act of 1849.

2. Did the act of 1847 confer upon the Vermont Central company authority to enter into the arrangement with complainants, contained in the lease?

The charter of the Vermont Central company was granted Oct. 31, 1843; no power was reserved therein by the legislature to alter or amend it. Therefore, no material alteration could be made without the assent of the stockholders,—not of a majority, but of every individual stockholder therein,—because this matter of increasing the powers of the corporation is not within the scope of, or in obedience to, the provisions of its original constitution.

Beyond the limits of the act of incorporation the will of a majority cannot make an act valid. A. & A. on Cor. 469, (Ed. of 1858); 1 N. H. 47-8, *Union Locks and Canals v. Towne*; A. & A. on Cor. 599, sec. 537, &c; 1 Stockton 401, *Kean v. Johnson et al.*; 19 Eng. L. & Eq. 350, *Clay v. Bufford*; 3 Maule & S. 448, *Davis v. Hawkins*; 4 John Ch. 573, *Livingstone v. Lynch*; 5 Hill 386, *Hartford & N. H. R. Co. v. Crosswell*; 18 Barb. 312, *Macedon & Bristol Plank Road Co. v. Laphan*; 29 Vt. 545, *Stevens v. Rut. & B. R. Co.*; 12 Beav. 377, *Solomons v. Lang*; 6 Railway Cas. 301, same case.

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At the meeting of Aug. 15, 1849, when an attempt was made to have the act of 1847 accepted, neither a majority of stockholders or stock were present or represented.

The meeting was not properly called so as to be authorized to act upon the question of the acceptance of this act. It was a special meeting. There was not anything in the call relating to the act of 1847, or that indicated that the question of its acceptance would come before the meeting for consideration.

In cases of special meetings of a corporation, when the business is unusual or important, it is indispensable that the call for the meeting should state the business to be transacted; if not so stated, the doings of the meeting will be illegal and void. Red. on Rail. 16, sec. 21, paragraph 3 and note; A. & A. on Cor. 560-1; 2 Burr. 735, *Rex v. Town of Liverpool*; 2 Burr. 744, *Rex v. Town of Doncaster*.

3. On August 24, 1849, the railroad of the Vermont and Canada company had not been commenced; the stock had not been subscribed for or otherwise taken up. The arrangement, on that day concluded, was made to enable the Vermont Central company to raise money to build the railroad of the Vermont and Canada company, and is not such a lease as was contemplated and authorized by the act of 1847.

II. 1. The agreement of July 9, 1850, which the complainants now seek to have enforced, was never of any binding force upon the Vermont Central company, and cannot be sustained.

1st. Because there was nothing in the *charter of the company*, nor in the *act of 1847*, which authorized this contract.

2d. Because this contract, in the nature of a mortgage by one railroad company of its road to another, was *without consideration*, and *not in furtherance of building* the Central road, or of *paying the debts* contracted therefor.

Railroad corporations may sell or mortgage their personal property, but they cannot sell or mortgage with it the road, nor any other corporate right or franchise, without the authority of the legislature. *Hull v. Sullivan R. Co.*, Red. on Rail. 579,

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and the authorities there cited; 19 Eng. L. & Eq. 514, *South Yorkshire R. Co. v. Great Northern R. Co.*; 32 N. H. 538, *Pearce et al. v. Emery et al.*; 9 Hare 305, *Great Northern R. Co. v. Eastern Counties R. Co.*; 12 Eng. L. & Eq. 224, same case; 21 Eng. L. & Eq. 319, 329, *Shrewsbury &c., R. Co. v. London, &c., R. Co.*; 19 Eng. L. & Eq. 584, *Johnson v. Shrewsbury, &c., R. Co.*; 13 Eng. L. & Eq. 506, *Winch v. Birkenhead, &c., R. Co.*; 21 How. 442, *Pearse v. Mad. & Ind. R. Co. and Peru & Ind. R. Co.*; 6 Eng. L. & Eq. 106, *Beman v. Bufford*; 13 Eng. L. & Eq. 359, *Simpson v. Denman*; 7 Eng. L. & Eq. 505, *East Anglian R. Co. v. Eastern Counties R. Co.*; 16 Eng. L. & Eq. 180, *McGregor v. Deal and Dover R. Co.*; 30 Eng. L. & Eq. 120, 144, *Norwich v. Norfolk R. Co.*; 8 Gill & John. 249, *Penn. Del. Md. Steam Nav. Co. v. Danbridge*; 3 Wood. & Minot 105, 112, *Sumner v. Many*.

The act of 1847 did not authorize the conveyance of July 9, 1850. It gave authority to corporations to make leases or contracts of that character, but no authority to convey their property and franchise absolutely or conditionally. Contracts of this character must be made strictly according to the authority conferred, or they are not binding. 49 Eng. L. & Eq. 350, *Clay v. Bufford*; 6 Clark & Finnelly 113, 136-7, *Shrewsbury, &c., R. Co. v. N. W. & S. Union R. & Canal Co.*

The charter constitutes the contract between the stockholders, by which they are to be bound in regard to the enterprise contemplated, and by it the whole funds of the Company must be appropriated to the purposes specified in the act of incorporation, and none other. This contract is protected by the tenth section of the Constitution of the United States from alteration by the legislature, without the consent of every party to it.

The agreement of July 9, 1850, contemplates the appropriation of the funds of the Vermont Central Company to an object entirely different from the stipulations and purposes of its charter. It makes a new contract between the parties, and consequently cannot be binding until it has received the assent of every stockholder. The burden of proof is on the complainants to show such assent. The case, so far from showing this assent, shows that the acts of the special meeting of stockholders, held

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July 9, 1850, were illegal and void, for the reason that in the call for that meeting, the conveyance of July 9, 1850, was not named, (though perfected at the time the call was made,) nor referred to in such manner as to give any person any information that such an instrument would come before the meeting. The call was one that would certainly mislead, and was probably so intended. The notice says the meeting is called "for the purpose of acting on a lease of the Vermont and Canada Railroad and *other arrangements connected therewith.*" Who for one moment would have thought, that under this call it was intended to introduce a measure which would have the effect to take from the corporation all its property and franchise, and divert all its funds into a channel not contemplated by its charter, so effectually that neither the stockholders nor the then or subsequent creditors would derive any substantial benefit from that property or those funds? Yet such is the fact if this conveyance is sustained.

Complainants contend that the lease and mortgage conveyance have been ratified by the Vermont Central Company and its directors since their dates.

1. They had no power to ratify what they had no authority to make.

2. There are no acts or doings of the company or its directors, between July 9, 1850, and October 20, 1851, the date of the first mortgage, relating to the mortgage conveyance of the former date. No acts or doings after October 20, 1851, can affect the rights of the bondholders.

Again, complainants contend that the mortgages given to secure bondholders were made subject to the contracts between complainants and the Vermont Central Company. The rights of the bondholders cannot be affected by that clause, because the lease and mortgage conveyance must be held illegal and void for want of authority and power in one or both of the companies to make them,

Again, complainants contend that the trustees have recognized the existence and validity of these agreements. The contracts being illegal and void, no length of acquiescence or recognizance by the stockholders of the Vermont Central Company or by the

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trustees for the bondholders, can give them validity. 7 Eng. L. and Eq. 505, *East Anglian R. Co. v. Eastern Counties R Co*; 16 Eng. L. and Eq. 180, *McGregor v. Deal and Dover R. Co.*; 30 Eng. L. and Eq. 120, 144, *Norwich v. Norfolk R. Co.*; 18 Barb. 312, *Macedon Plank R. Co. v. Lapham*; Red on Rail. 95.

III. The Vermont and Canada Company ceased to exist by reason of its non-compliance with the provisions and requirements of the act of November 18, 1858.

The charter of the Vermont and Canada Company provides that in case the railroad is not completed within thirteen years from October 31, 1845, then the corporation *shall cease and the act of incorporation be void*. This time expired October 31, 1858, but was by several acts extended to November 20, 1858. The act of November 18, 1858, extended the time four years, on the condition that the company *did within* nine months survey and locate that part of its line mentioned in the first section, and expend upon the construction thereof fifty thousand dollars; and the act further provides that if the company fail to perform this condition, then the company could not take any benefit under the act. The company did not perform this condition. Another act of November 25, 1858, provides, in case the company fail to perform the condition above named, and its charter thereby became forfeit, the receivers should continue to operate the road under the directions of the chancellor until January 1, 1860, and that the act shall take effect only in the event of the forfeiture of the charter.

Here, then, the corporation came to an end. It ended according to the terms of the act creating it.

The last mode in which a corporation may be dissolved is by the expiring of the period of its duration, limited by its charter or by general law; upon dissolution in which mode all the consequences of dissolution in any other mode, such as forfeiture of property, extinguishment of debts, abatement of suits, &c., ensue, unless, as is usual, they are provided against. Upon such a dissolution without previous provision, it is beyond the power of the legislature, by renewing the charter, to revive the debts and liabilities owing to the corporation. A. & A. on Cor. 904, sec. 778, and authorities there cited; A. & A. on Cor. 191, 874,

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5th ed.; Grant on Cor. 303; 7 Leigh 154, *Rider v. Union Factory*; 2 Robinson 207, *May v. Bk. of N. Carolina*; 8 Watts & Serg. 207, *F. and M. Bk. v. Little*; 23 Maine 318, *Reed v. Frankfort Bk.*; 26 Maine 335, *Whitman v. Cox*; 3 Story Cir. Ct. 658, *Greely v. Smith*; 17 Alabama 766, *Saltmarsh v. Bk. Mobile*; 13 Ohio 298, *Remick v. Bk. of West Union*; 2 Harrington 8, *Bank v. Lockwoods*.

IV. The legislative act of November 17, 1859, had the effect to *change the terms of the lease, or the rights of the parties under it.*

1. It imposes duties, upon the party who shall operate the road constructed under those acts, *different* from the duties existing in the charter at the time of the lease, and thereby relieved the Vermont Central company and its assigns from the performance of the covenants in the lease.

2. But there is another view to be taken of this point.

The grant, by the Vermont and Canada company, to the Vermont Central company, of the right to fix the tolls, fares, and rates of compensation, &c., and to use the railroad of the former, with its cars, engines, &c., in any way which it may from time to time elect, should be considered *as conditions precedent*, which must be continually fulfilled by the former, before the latter can be made liable for rent. The contract to pay rent is dependent on the contract that the lessee shall have the entire control of the entire thing leased, in the manner and for the purposes named in the lease; and this control being taken away, or materially abridged by the neglect, and with the assent of the lessor, the lessee can no longer be obliged to use the railroad, and pay the stipulated rent therefor. 2 Parsons on Cont. 39; 7 Adol. & Ellis 54, *Mechelln v. Wallace*; 11 Mees. & W. 480, *Cumbe v. Green*; 7 Barb. 618, 619, *Parnales v. Os. and Syr. R. Co*; 15 Vt. 448, *Goodale v. Field*.

3. The conduct of the Vermont and Canada company in accepting the legislative acts of Vermont, with the burdens and conditions imposed, *amounts to an eviction of the Vermont Central company from the premises, which releases it from paying rent.* 1 Washburn on Real Property 342-3, and cases there cited.

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BARRETT, J. Under the lease of August 24th, 1849, and the addition thereto of July 9th, 1850, the orators, with the co-operation of the Vermont Central Railroad company, proceeded in the completion of their road from Essex Junction to Rouse's Point, and, upon such completion, the Vermont Central company took possession thereof, and, by themselves and the trustees under the first mortgage, with the incidental interposition of the court of chancery, have continued to possess and operate said road to the present time. The first and second mortgages were both made subject to the rights and duties provided and stipulated in said lease and the addition thereto. The bonds that were issued by the Vermont Central company were upon the security created by the said mortgages respectively, and the rights of the bondholders in reference to such security are created by, and derived through said mortgages.

The rent was paid to June, 1854. That falling due in December, 1854, remaining unpaid for more than four months, this bill was brought to enforce the security for the same, created by the indenture of July 9th, 1850, and was entered in the court of chancery for Franklin county, June Term, 1855. In the meantime no rent has been paid since that which fell due and was paid in June, 1854.

The Vermont Central company and the trustees under the first mortgage, in argument before this court, admit the legality and binding force of the lease of August 24th, 1849, and also of the indenture of July 9th, 1850, so far as it was designed, and may operate to give security upon the earnings of the roads for the payment of the stipulated rent. They object to possession of the roads and property being given to the orators under the last indenture, claiming that to that intent the contract is illegal and invalid. They also object to the claim as made by the orators in respect to the cost of construction, and to their claim for incidental expenses.

The second mortgage is not represented in this court. Mr. Sohier, a bondholder under the first mortgage, made answer to the bill, and appeared in the court of chancery, standing upon the bill, his answer and the proofs taken in the case, so

far as they were pertinent to the issues made by his answer. He is represented in this court by counsel, who in his behalf, and, through him, in behalf of some other bondholders, contest the rights claimed by the orators. A leading point made and urged by the learned counsel in the argument is, that the indentures of August 24, 1849, and of July 9th, 1850, are not valid, and never were binding on the Vermont Central company, by reason of being *ultra vires* of either corporation to make, though their validity is not put in issue on this ground by Mr. Sohier's answer.

Various other points are taken and urged, which will be considered, so far as may be necessary in deciding the case. Upon the point first named the contest is between the orators on the one hand, and Mr. Sohier as a bondholder, on the other, standing upon his rights to the security created and furnished by the first mortgage. The character of the question is such, in the relation that the parties to it sustain to each other and to the subject matter involved, that we have given it full consideration, irrespective of the defect in the record in this particular.

It is too late to question the doctrine that a corporation has only such powers as were conferred by the power that has created it. By the original acts of incorporation, neither of the parties were endowed with the power to enter into such contracts of lease and security as were made in this case. If this case was standing only upon the original acts of incorporation, they would be subject to impeachment for invalidity, in behalf of parties sustaining such a relation to either of the companies and to the contracts as to entitle them to question their validity.

In considering this subject as it is presented in the argument, a distinction is to be noted between the invalidity of a contract resulting from the want of capacity to make it, and that resulting from its being in violation of law, or contrary to public policy. If such contract is not in violation of some public law or contrary to public policy, it would seem that only the immediate parties to it, as the corporations themselves, or the stockholders, who are parties by representation, would hold such a legal position in relation to it, as to entitle them to raise the question of

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validity on account of the want of capacity ; while on the other hand, if such contract was in violation of some public law, or against public policy, in such sense as to make it void and of no efficacy to any intent, any person standing in a relation of interest to the subject matter of the contract, and to be affected by its operation, might undoubtedly set up and insist on such fatal vice in it, for the purpose of clearing himself from the consequences of its being carried into effect.

Though the original acts of incorporation of the two railroad companies do not provide for such contracts as were made in this case, still they do not in terms prohibit them. Whether it was or was not competent for the legislature, by subsequent general or special enactments, to vary in this respect the powers and capacity of the corporations, without their assent thereto, it certainly would not be *unlawful*, in the sense of being in violation of some public law, or contrary to public policy, as those terms are used in relation to such subjects, for the corporations to exercise any powers or rights conferred by such subsequent legislation. So far as one corporation, as an immediate party to a contract made in the exercise of such powers or rights, should, concurrently with the other party, assent to the legality of such contract, it is difficult to see upon what principle a party holding under such corporation, by virtue of a contract that expressly recognizes the existence of such prior contract, and the rights and duties thereby created, and in express subjection to them, can be permitted to impeach its validity and binding force. As between the two corporations, both conceding and asserting the lawfulness of the contract to which they were parties, it would seem that no plausible pretext could be assigned why they might not have a sure standing in the courts for the enforcement of their respective rights created by such contracts. Suppose, in the present case, that there had been no mortgage to secure the bonds issued by the Vermont Central company, who but the corporation, or its individual corporators, could have denied the validity of the lease, in defence to the enforcement of its provisions ? And can a party who stands upon a security taken in express subjection to that lease and the rights and duties thereby created, stand

upon better ground than the one giving the security, so far as the question of the validity of the lease depends on the question of lawful capacity to make it?

The act of 1847, sec. 34, (Comp. Stat., chap. 26, sec. 66) provides in terms that "all railroads incorporated, or which may be incorporated under the authority of this State, shall have power to make contracts and arrangements with each other. * * for leasing and running their roads or any part thereof," etc.

This, in terms, does, and clearly in purpose was designed to, confer the powers named upon corporations then already existing. This of itself is conclusive upon the question of *public policy* in this respect, as well as upon the question of *lawfulness*, in the sense in which it has been thus far considered.

But however the above views may be regarded, there is another light in which the subject seems to stand upon clear ground.

It was competent for the corporations, by the unanimous consent of their stockholders, to accept such additional powers conferred by a general law, and exercise them with the same efficacy, to every intent, as if they had been conferred by the original act of incorporation. It is shown by the evidence that the corporations, did exercise these powers in making said contract of lease and security for the rent, and that, too, by the direct action of a stockholders' meeting, called and held for that purpose on the 9th of July, 1850. Such exercise of those powers is, in the absence of any averment or evidence to the contrary, sufficient ground for assuming that the corporations, as such, had accepted them as a part of their organic law; and particularly is this assumption well made, since no member of the corporations has ever interposed any protest or dissent. The ordinary rules of presumption require this, until the contrary is asserted by some party lawfully competent to make issue upon it, and who does make and maintain such issue in a mode and by means warranted by the law.

We are unable to assent to the criticism made as to the character of the notice of that meeting. It seems to us that it comprehensively indicates in substance the matters to be acted on, to the full extent of the action that was contemplated or taken. It does not seem adapted to mislead anybody interested and hav-

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ing a right to participate in the action contemplated, nor do we discover in it, or in the circumstances and occasion, evidence of any sinister or improper intent on the part of those at whose instance the meeting was called. That no one of the stockholders was in fact misled by it, or dissents from the action there token, is clearly evinced by the fact that no one has ever, by any from of proceeding, asserted any immunity against that action or the consequences flowing from it. Inasmuch as that meeting of the stockholders was properly called, and all had an opportunity to be present and act upon the subject of it, and as the vote of those present was without any dissenting voice, and as no one of them has since in any form objected to the action then had, it is to be taken and held, for the purposes of this case, that all the stockholders concurred in that action, and that they assent to its effect for all legitimate purposes touching the rights, either of the corporation or of themselves individually as members of such corporation; Redf. on Railways 11; 11 Vt. 302, Ang. and A. on Corp., sec. 238, 1.

The ground on which it is held that an original charter that has been acted upon by the organization of the corporation under it, and by the investment of funds in its capital stock in pursuance of its provisions, and for the accomplishment of the prescribed purposes of its creation, cannot be materially altered, by subsequent legislation, so as to bind the corporation itself, or the individual corporators, without their assent respectively, is, that, as between the State and the corporation, the original charter becomes a contract mutually obligatory, and that, as between the corporation and the stockholders, it is matter of contract that the corporation shall administer the funds and exercise the functions according to the provisions, and in accomplishment of the purposes, prescribed by the charter. The stockholder has distinct individual rights as against the corporation, growing out of that relation, which he cannot be compelled to yield or forego without his assent. In this respect he is not subject to the will or vote of the majority. It is only as to matters within the prescribed limits of corporate power and capacity, that he, as a stockholder, becomes, on common principles, subject to the vote of the majority. Standing upon those rights and in the exercise thereof, he

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may, at his pleasure, and effectually, assent to or dissent from measures adopted by corporate vote in the usual mode. But this is personal to himself alone, unless by privity of personal contract with him, another obtains this his personal right. In the present case the bondholders stand in no relation of privity with the individual stockholders, in reference to the rights above referred to. They hold their relation of interest in virtue of their contract with the *corporation* itself, evidenced by the bonds held by them, and the mortgage given by the corporation to secure them. They came into that relation after the enactment of the general law conferring the enlarged powers in question upon railroad corporations, and after the exercise of those powers by said corporations in the making of the contracts of lease and security for rent, and in express subjection to those contracts.

Those contracts, then, in relation to the bondholders, so far as their validity depends on the capacity of the corporations to make them, must stand upon the action of said corporations in exercising and adopting the additional powers conferred by the general law of 1847, in pursuance of which said contracts were made.

It seems proper in this connection to notice a point much and mainly urged in the argument of Judge PERLEY, viz: that the indentures are not what they purport,—a *lease* and security for *rent*; but are a pretext and cover under which, in point of fact, the Vermont Central Company went on and built, with its own funds and means, the Vermont and Canada Railroad, the same as if the latter company had not existed, the pretended taking of stock in that company being, in fact, a loan of money by the stockholders to the Vermont Central Company at a guaranteed interest of eight per cent. This being assumed to be the true character of the transaction, then it is claimed and argued that this is beyond the powers conferred either by the original charter or by the general law of 1847. It is, perhaps, true that the stockholders expected to get eight per cent. on their money invested in the purchase of stocks, and that the provisions for rent, according to the practice of the Vermont Central Company and the trustees, in the payments made by them under the lease, would substantially accord that to them. But we fail to find

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sufficient ground for sustaining the point thus made. The instruments themselves purport in their provisions to be a *lease* of a road then already chartered and located, with stipulations as to its being seasonably completed, and in a lawful and proper manner, all to be done with the money and means of the Vermont and Canada Company. The reason which induced the Vermont Central Company to enter into this arrangement cannot vary the true character of the transaction as it was consummated between the parties. It was important for the Vermont Central Company that the Vermont and Canada Road should be built. The latter company, as depending on the ultimate character and profitability of the road as an independent enterprise, in the condition of the public mind then prevalent, as to railroad stocks and securities, found itself unable to dispose of its stock to a sufficient extent to realize the necessary means for constructing the road. In this condition of things, the Vermont Central Company deemed it advisable to propose, in a mode provided and authorized by law, to remove the cause for hesitating and declining to take the stock, by taking a lease of the Vermont and Canada Railroad, paying a rent therefor that would render the stock a safe and eligible investment, if the latter company would go on and make it. Being satisfied that, under such a contract of lease, it could proceed with the enterprise of making the road in reliance on the sale of the stock, as the ultimate source of means with which to do it, the Vermont and Canada Company entertained the proposition, and the indentures were accordingly made. That the means, thus raised, in fact disbursed the cost and expense of making the road is not denied. But it is claimed that all this was only a kind of machinery, by which the Vermont Central Company in fact had a *loan* of the stockholders of the Vermont and Canada Company of the amount of money thus raised, at an interest of eight per cent.

If this be so, it is noticeable as a peculiarity of *this* loan that there is no obligation or duty ever to pay the principal. It is also noticeable that the Vermont Central Company have no title or ownership of the road, depots, lands and appurtenances, except what is created by the indentures, and that is of a mere lease hold. It is particularly worthy of notice that all the stipulations

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in the indentures, as well as all that has been done in pursuance of them, are as consistent with the character of a *lease* to be given to the transaction, as that of a *loan* of money to the Vermont Central Company. The fact that the Vermont Central Company advanced money for the current expenses to some extent, while the road was in process of construction, in reliance upon Vermont and Canada Company stock, and sold some of that stock at a discount as a mode of raising funds, does not, as matter of law, vary the character of the indentures. This could be regarded at most as a temporary advance or raising of money for the Vermont and Canada Company, under arrangements for the time being, to which only the stockholders of the Vermont Central Company would have the right to make objection, and that too at the time of the transaction, and would not fix or taint the character of the arrangement created and evidenced by the indentures. We see nothing in the case requiring, or that would warrant the court to give to the transaction the character imputed to it, or to hold it to be other than the indentures give to it—a *lease*.

As to the indenture of July 9, 1850. We are not sufficiently concurring to warrant us to decide that it should be held operative, so far as it purports to grant, sell and convey to the Vermont and Canada Railroad Company, its successors and assigns forever, the said Vermont Central Railroad, as now built and constructed, and all its lands, depots and easements, &c., with the right to enter or take possession of, and use and run, not only the Vermont and Canada, but also the Vermont Central, together with all lands, depots and other property, rights and privileges owned and enjoyed by each of said companies, and used in connection with, or for the purpose of running or working each of said railroads, as is specifically provided therein. So we refrain from any discussion of that feature of the instrument.

It is obvious that one leading purpose of the instrument was to make "reasonable security" to the Vermont and Canada Company for the payment of the stipulated rent. The question whether it was competent for the Vermont Central Company to contract for the pledge of "all tolls, fares, and other lawful income receivable for the use of said railroad," after paying the

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expenses of running, and keeping in repair, and furnishing proper furniture, for the payment of the rent in arrear, runs clear of, and is distinct from, the question of the right of that Company to convey in mortgage its property, franchises, easements, and privileges, with the possession thereof.

The Vermont Central Company, and the trustees under the 1st mortgage, concede the right to make such a pledge, and admit the validity of the indenture of July 9th, 1850, as such pledge of the tolls, fares and income. Mr. Sohier avers nothing to the contrary in his answer. His counsel in the argument do not question the *right* in this particular and to this extent.

They question and deny the validity of the instrument as a conveyance in mortgage of the property, franchises, easements, and privileges, with the right of possession, as being *ultra vires*, and also for the reason that, if enforced in that respect, it would substantially transfer the railroad, and all the property, franchises and privileges of the Vermont Central Company to the orators, without consideration.

The argument, predicated upon the alleged want of consideration, would legitimately apply to the right of the orators to enforce the instrument in its feature of a pledge of the tolls, fares, and income, as well as to the other feature, viz: that of a conveyance in mortgage as before named. But it is to be noticed that Mr. Sohier, in his answer, does not aver any want of original consideration, as a ground of invalidity of either of said indentures, but insists that, by reason of the failure of the orators to do certain things required by their charter, and the act in amendment, of November 18, 1858, the Vermont Central Company has been, and is absolved from obligation to perform any of the covenants and agreements contained in said indentures; and that they have become void, and the orators have no rights under them; that the consideration for the making of them by the Vermont Central Company has wholly failed, from the acts and omissions of the orators; that the execution of said covenants and agreements has become impossible, through the aforesaid acts and omissions of the orators, and then specifies wherein; thus, controverting the validity of both the instruments solely on the ground of matters accruing long after their execution and deliv-

ery, and in no manner on the ground of an original want of consideration. In this state of the case, the duty is not incumbent upon the court to discuss or decide questions that are not brought in issue by the record.

Before discussing the questions raised upon the answer, as to the rights of the orators, as affected by the alleged *failure* of consideration, it seems proper to consider the point made by the answer, that by reason of non-compliance with the requirements of the 2d section of the act of November 18, 1858, the orators' charter is forfeited. Whether forfeited or not depends on the effect to be given to the provision in the 2d section of the charter, and the subsequent legislation in respect thereto. The language is, "If the company shall not, within five years, commence the construction of the road, and shall not within thirteen years, complete and put in operation said road connecting, &c., then this corporation shall cease, and this act be void." The act of 1858 substituted a new section for that 2d section, giving the company further time, and prescribed more particularly the manner and conditions of the connection to be made in Burlington with the Rutland and Burlington Railroad, and providing that, unless the provisions of that act of 1858 should be complied with, the company should take no benefit from the act.

If those provisions were not complied with, then of course the matter stood the same as if that act had not been passed. By an act of November 25th, 1858, it was provided, that, in case the company shall fail to comply with the provisions of said act of November 18, 1858, *and its charter shall thereby become forfeited*, it shall be lawful for the receivers and managers of said road to continue to operate it until January 1st, 1860, and until otherwise provided, under the direction of the chancellor, who may require such persons to give bonds, &c., "*Provided*, nothing in this act shall be construed to give effect to the same, only in the event of the forfeiture of the charter of said company." It is claimed that, under these acts, the non-compliance with the 2d section of the charter, and of the amendment of it by the act of November 18, 1858, operated as a forfeiture, without the intervention of any proceedings in that behalf.

Whatever might be the legal consequences of such non-com-

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pliance, we do not understand from this peculiar form of enactment that the legislature have undertaken to *declare* a forfeiture, but only to prescribe the consequences to flow from certain acts and omissions. Whether such acts and omissions had in fact occurred the legislature did not assume or design to determine. Whether they had occurred or not was left to be determined upon proofs to be adduced in a proper proceeding, to be instituted for the purpose of testing the question of forfeiture. It is beyond question, that, unless the legislature undertake to declare a forfeiture upon facts that have already occurred, it appertains to the judicial department of the government to determine whether such forfeiture has been incurred. When the act of the legislature only prescribes the elements which shall operate as a forfeiture, whether such elements exist or not is an open question, which the party, against whom they are alleged, has a right to contest before a judicial tribunal.

The provision in the act of November 25th, 1858, as to its being lawful for the receivers and managers of said road to continue to operate the same under the direction of the chancellor, is entirely consistent with this view, and was as necessary in case of a forfeiture declared by the court as by the legislature, until further provision should be made for the operation or disposition of said road after the taking of such forfeiture.

Again, the intention of the legislature on this point is quite clearly indicated by its further action on the subject in 1859, when, instead of either assuming or declaring that a forfeiture had occurred, they proceeded again to amend the 2d section of the charter by providing and prescribing further time, and other modes of completing the road into Burlington, and making connection with the Rutland and Burlington Railroad; in failure to do which, the same language is used as in the original charter, and in the act of November 18, 1858, viz: "then this corporation shall cease, and the charter thereof be void"—language quite inappropriate, if, in the understanding and intention of the legislature, a forfeiture had been already taken by force of the prior action of the legislature on that subject. A forfeiture of a corporation can only be taken in behalf of the public, and by some form of proceeding to which the public, by proper representation,

is the party moving it, and in which, by competent authority, such forfeiture is declared. On this general subject—see 11 Vt. 302; Angell and Ames on Corp., secs. 776–777, Redfield on Railways 603, (3.) Inasmuch as the legislature have not, in this case, undertaken to declare such forfeiture, it is needless to discuss whether, in such a case as this, it appertains to the legislative department of the government to take upon itself the exercise of such a prerogative. Regarding the orators as a still existing corporation, under their charter and the laws of the state, it becomes unimportant to consider the arguments of counsel predicated upon the assumption of the extinction of the corporation by forfeiture.

Assuming, what is not controverted in the answer of Mr. Sohier, and is admitted by the Vermont Central Company, and the trustees under the first mortgage, that the indentures of August 24th, 1849, and of July 9th, 1850, are not affected with any want of original consideration, it is to be determined whether by what has occurred since their execution and delivery, the orators have lost their right under them to claim the rent and the security thereby stipulated and provided.

It is clear from those instruments, that it was the understanding and design of the parties, that the Vermont Central Company should pay rent at eight per cent. on the cost of such portions of the road as should be accepted by them in the manner provided therein. The road was constructed and accepted accordingly from Essex Junction to Rouse's Point; and thereupon the Vermont Central Company went into the possession and use of it as thus constructed, and by themselves, and assigns, have had the possession and use ever since. This suit is instituted for the enforcement of the security for the payment of rent accrued and in arrear for the road as thus located, constructed and used, and that may accrue up to such time as all the rent in arrear shall have been paid, conformably to the provisions and stipulations of said instruments. In the absence of any vice of illegality in the contracts under which the road has been thus used, and in the absence of any averment or evidence of fraud or bad faith towards the bondholders, if the orators are to be precluded from

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enforcing the security provided for the payment of the rent, it is to be by force of some stringent rule of law.

As to the neglect of the orators to build and complete their road so as to meet the Rutland and Burlington Railroad in the village of Burlington, and to connect the same with the Canada line in Highgate, within the time limited in the original act of incorporation, and in accordance with the covenants of the orators contained in said indentures, by reason of which it is claimed that the Vermont Central Company has become wholly absolved from all legal or equitable duty to perform any of the covenants in said indentures, and the same have become wholly void and inoperative :

It is obvious from the indentures taken together, and, particularly, from the last item of agreement in that of July 9, 1850, that the parties did not contemplate the building of the road other than from Essex Junction to Rouse's Point, unless, as matter of necessity, in order to save the corporate existence and rights of the Vermont and Canada Company, to an extent sufficient to enable the Vermont Central Company to enjoy the road under the lease. The substantial thing was the road from Essex Junction to Rouse's Point. If it should become necessary to build more, in order to a compliance with the law binding upon, and to be enforced against, the orators, then such additional road, when built, was to be the subject of rent, the same as that then already located and in the process of construction. In view of any evidence in the case, it is not pretended that the Vermont Central Company, or any party or interest in privity with it, has as yet suffered any detriment by the failure to locate and make the residue of the road within the prescribed time. The Vermont Central Company, and the trustees who appear in this court, are making no claim against the right of the orators to the rent, and the security therefor, on this account. Up to the present time the lease has yielded all the benefit to the lessees and their assigns, that was originally provided or designed by it. They have had all the use they expected or wanted, and all that they desire to have hereafter, as is clearly evinced by the circumstances and history of the matter, developed by the evidence

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in the case. But it is said, that, by reason of the neglect to comply with the requirements of the 2d section of the charter, the orators, in order to save their existence, have been obliged to accept an amendment of their charter in this respect, which, when complied with, will put the Vermont Central Company in a position of disadvantage under the lease, as compared with that which they would have held, if the orators had complied with the requirements of the original charter; in fact, that it has become impossible for the orators to fulfill their undertakings in the instruments of lease. It is to be borne in mind that this bill was brought, and the whole proceeding has gone forward, with reference to enforcing payment of rent for the road, as it has thus far been located, constructed and occupied. The proceeding before the masters, and all the evidence bearing on the question of the sum for which rent is to be paid, has reference only to the road as already constructed and occupied. And any decree to be made in the case, under the present bill, in favor of the orators, must be predicated upon the cost of the road as it was at the time it was so completed as to be the subject of rent under the lease.

The Vermont Central Company, under the instruments of lease, are not to be called upon to pay rent for any other portion of the orators' road, till the same shall have been constructed and proffered for acceptance. Whether such further portion of the road shall be built or not is a matter to be settled between the orators and the state. When it shall have been built, and proffered for acceptance, and rent claimed therefor, the question may then properly be raised as to the obligation of the Vermont Central Company to accept the same, and pay rent therefor, depending upon the duties and liabilities with which the possession and use of it may be incumbered by virtue of additional legislation in that behalf, on account of the failure of the orators to comply with the requirements of the original charter.

The immediate duty to the public, under the charter and subsequent legislation in respect thereto, rests upon the orators. The Vermont Central Company has assumed to perform so much of that duty, and in such manner, and upon such terms and conditions, as are specified and stipulated in the instruments of lease.

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Their duty in that respect is owing to the Vermont and Canada Company. It is matter of contract between them. The provisions for remaining duties to be performed by the Vermont and Canada Company towards the public are contained in the act of 1859. The time therein limited, upon the expiration of which the discharge of that duty to the public is to commence, has not yet expired: so of course, it cannot now be known, or determined, whether, at that time, the performance of that duty will be exacted in the manner and measure provided in that act, nor, if it should be so exacted, what will be the consequences of a failure to perform it. If it should be exacted in that manner and measure, the question might then arise whether, by the instruments of lease, the Vermont Central Company was under obligation to assume the performance of it in behalf of the orators. If it should be held not to be under such obligation, it would then rest with the orators to determine whether they themselves would undertake the performance of it, by means and measures of their own, or neglect to do it, and hazard the consequences. Whether, in this latter event, such consequences would follow as would affect the rights and liabilities of the parties under the instruments of lease, cannot now be forecast or assumed.

It would seem to be seasonable to determine that, when the case shall have arisen involving the question, with a feeling of reasonable assurance in the mean time, that the law will afford ample protection to all interests involved. If the present posture of the case, we are unable to say that there has been such a failure on the part of the orators to perform the undertakings in their part in the instruments of lease, or that, by means of a failure on their part to perform the requirements of the charter, and the amendments thereto, they are now in such a position of inability to perform said undertakings, as to preclude them from the right to enforce the payment of the rent which shall have accrued prior to the happening of those events which, it is claimed, should thus operate against them.

In this view, it is impossible for us to see how there has as yet been a failure of the consideration, upon which the Vermont Central Company undertook and covenanted to pay the rent stip-

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ulated, and made provision for securing the payment thereof.

The most that the case furnishes ground for saying is, that there is some reason to fear that, in some respects, the orators may fail to make good their undertakings, which, in part, constituted the consideration upon which the Vermont Central Company agreed to pay the stipulated rent and made the security therefor.

In the absence of any evidence of bad faith or willful default on the part of the orators towards the lessees and their assigns, in the course taken by them in reference to the unperformed requirements of the second section of the charter, either original or as amended, and in view of the fact shown by the evidence, that both the Vermont Central Company, and the trustees under the first mortgage, have approbated the course thus taken, and by the fact that none of the bondholders have manifested any disapprobation till since the act of November 18, 1858, and in the absence of any prejudice that has as yet occurred to any interest of, or derived through, the lessees, by the course thus taken, and in the want of any sufficient ground for determining that any prejudice is destined hereafter to accrue therefrom, the inequity of holding the orators disentitled to enforce their security for the rent becomes very palpable, and particularly so, when it is considered that the lessees, and their assigns, have had the full use and benefit of the orators' road, located and constructed to the approbation and acceptance of the lessees, with the money and means furnished by the orators, in substance agreeably to the stipulation in the instruments of lease.

This view being satisfactory to the court in reference to the points made in the answer of the trustees and of Mr. Sohier, as to the effect of the acts and omissions of the orators, since the execution and delivery of said instruments, upon the right of the orators to the rent accrued, and the liability of the Vermont Central Company and assigns in reference thereto and the security provided therefor; we regard it unimportant to discuss various points and views presented by the counsel for the orators, and particularly, as to the relation of the trustees and bondholders to each other, and how the bondholders should be affected by the acts of the trustees, in reference to the possession under the

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mortgage and deed of surrender, and the use of the road, and the payments of rent made by them.

And, as before intimated, we do not feel called upon to discuss and decide many questions made in the argument by counsel for the respective parties, which are not raised by the issues made by the pleadings, by and in behalf of such parties.

Owing to the lack of concurrence before named, as to one feature of the instrument of July 9, 1850, many points made in the argument are not properly debatable on this occasion.

Under the view in which the court do concur, in relation to that instrument, the case stands, not upon the ground of a bill to enforce a *specific performance*, as was claimed in respect of the feature of it which calls for the enforcement of that instrument as a grant, sale, and transfer in mortgage of the road, property, franchises and privileges of the Vermont Central Company with the right of possession; but upon the ground of a pledge and lien by way of security, and as a means of obtaining payment of the rents in arrear, upon the earnings and income of the two roads, with the right to have them applied for that purpose, in priority to the other creditors of the Vermont Central Company, who became such, and took their security, in subjection to such pledge and lien of the orators.

This being a pledge and lien by way of security, which, it is not denied, the Vermont Central Company was competent to give, and the orators to take, the principles and rules, governing the enforcement of it, are less specific and rigid than those governing the class of cases which, in equity law, fall under the head of *bills for specific performance*.

In pursuance of the views thus presented, we hold the indenture of August 24, 1849, to be a valid instrument, between the parties, and that of July 9, 1850, to be valid as constituting a pledge, and lien, by way of security, for the payment of the stipulated rent, upon the tolls, fares and incomes of the two roads, in priority to the trustees and bondholders, and that the same is enforceable for the rents in arrear of the road as already constructed and used.

As to the sum on which eight per cent., as rent, is to be computed :

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If it was now presented as an open question, in no way affected by the conduct of the parties, we should be inclined to construe the provisions in respect to rent, as contemplating the cost of construction, &c., to be measured by the actual outlay of money directly for those particular purposes. It was incumbent on the orators by the terms of the contract to furnish the means, and construct the road, and furnish depots, &c. This was to be done on their part, in order to produce the subject matter wherefor the stipulated rent was to be paid. The language of the stipulation to pay as rent therefor, "a sum equal to eight per cent. upon the amount of the whole cost, for the time being, of said road, its buildings, fixtures, lands and appurtenances, as the same shall have been paid by the Vermont and Canada Railroad Company," in its first and most natural impression, would seem to have reference to the money expended for those things, in payment for the making and purchase of them. But it seems that the immediate parties to the contract understood that a different measure of that cost was to be adopted, and, in fact, was adopted, and acted upon by them, and by the trustees in possession, down to and including the payment of rent made in June, 1854. The view which seems to have been taken was, that as all the funds of the orators were devoted, directly or incidentally, to the accomplishment of the ultimate purpose of providing the road, for the acceptance and use of the Vermont Central Company as the subject matter of the lease, the funds so devoted were regarded and treated as the cost of construction, &c., and this was represented and measured by the capital stock paid in, with the addition of interest computed on the expenditures from the time they were made, in pursuance of the provisions of the contracts of lease.

However singular it may appear, that the Vermont Central Company should make the contract with this view of what was to be deemed the cost upon which the rent was to be computed, the evidence, and particularly that furnished by the acts of that company, as shown by various reports of their officers, and by accounts investigated and stated, and most emphatically, by the payments of rent computed upon that basis, renders it free of doubt that the respective companies, acting through their author-

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ized officers, did understand and mean, in making the contracts, that such was, and was to be treated as, the cost upon which the computation of the rent was to be made.

Where the language of a contract is not explicit and incapable of but a single meaning and application in reference to the subject matter of it, what was the particular meaning and application which the parties mutually intended is open to inquiry upon evidence pertinent thereto. And the acts of the parties themselves, in carrying out the stipulations of the contract, and, particularly, the acts of a party in assuming the burdens imposed on him, to the most onerous extent of which the language of the contract is capable, are evidence of the most convincing character as to what their meaning was by the language used. When their meaning in this respect is determined upon evidence, in aid of the written instrument, that instrument, with that meaning, is the contract between them, and is effective to the same intents between them, and all in privity with them, or to be affected by it, as if that meaning had been expressed in unequivocal words in the instrument itself; unless, as to persons other than the parties, it should appear that it would be inequitable or unjust in the party claiming under and by force of the contract, in respect to or against them, to enforce it according to the true meaning and intent of the original parties to it.

In the present case it would not be enough, in order for the bondholders to avoid the effect of the contract as understood and acted upon by the two companies, to show, that, as between themselves and the Vermont Central Company, it would be prejudicial and unjust to them to give the contract that effect. They must go further, and show that it would be inequitable and unjust on the part of the Vermont and Canada Company, as against them, to have such effect given to it. The books furnish ample authority and illustration in this respect.

With a strong inclination to avoid such effect to the contracts in question, in the particular now under consideration, we have sought in vain for any evidence showing grounds for impugning the right, the justice, or the equity, in the orators to have the contract enforced against the trustees and bondholders according to its meaning and intent, as understood by the parties who made

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it. Indeed the counsel for the trustees do not controvert these views, but, on this subject, confine the argument to the point that the evidence is not sufficient to show the meaning of the parties to have been what the orators now claim. Nor do the counsel for Mr. Sohler controvert them, but, on this subject, confine the argument to showing that various items of cost of construction, claimed by the orators in the accounting before the masters, were properly disallowed, and to showing that, in the rent account as made up and allowed by the masters, interest on the rent in arrear ought not to be allowed. Under the view we take, as to the basis on which the rent is to be computed, the former of said topics of argument requires no consideration. As to the latter, though the question of the allowance of interest does not arise in the precise form and connection contemplated by counsel in the argument, still the point taken is equally applicable under the view we take of the case as to the basis of computing the rent.

It is well settled in this State that if the contract is silent on the subject of interest, and does not by implication exclude it, on money due and payable under the contract, the law implies that interest is to be paid from the time it becomes payable and should have been paid; *Porter et al. v. Munger*, 22 Vt. 191; *Wood v. Smith*, 24 Vt. 606; *Gleason v. Briggs*, 28 Vt. 135.

As to the claim that there should be added as cost of construction the sum of thirty-two thousand six hundred and seventy-two dollars and fifteen cents:

The history of that claim, as developed in the case, shows that it was a very proper subject of investigation before the masters. It is well understood, that, unless the result at which the masters arrive in taking an account is clearly shown to be wrong, the court will not disturb such result. The reasons for disallowing this claim are very clearly stated on the seventeenth and eighteenth pages of their report, appended to the printed case, and they are cogent. As against the reasons upon which they disallowed it, the alternative of its allowance by the chancellor is submitted by them as resting upon the agreement of the parties in April, 1857. That agreement may be well and effective between the two corporations; but since the trustees and bend-

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holders had long before that time supplanted the Vermont Central Company in the immediate interest to be affected by the allowance of that claim, it would transcend any principle of law with which we are acquainted to give that settlement the effect suggested, and especially so, in view of the facts reported, touching the origin and character of the claim, and the mode of adjusting it between the two corporations. For the conditions and details of that adjustment, the masters refer to the testimony of Levi Underwood and John G. Smith, taken in the case before them and (as they say) attached to the report; but it fails of being so attached, and is not contained in the case as it is made up and furnished to the court. Probably it was not contemplated that the court should revise the finding of the masters, upon the evidence that was adduced before them, and upon which they came to their result in this particular; but that, by the effect to be given to the settlement, and to what had transpired between the parties, as shown by the documentary evidence, and to the averment of claims in the answers of the Vermont Central Company and the trustees, the court should be asked to hold that this claim ought to be allowed, notwithstanding the finding of the masters as to the true relation of it to the actual cost of construction. Without discussing the topic further, it is sufficient to say that we are unable to yield assent to the allowance of the claim. If it is not cost of construction, then it ought not to be allowed. The masters have failed to find it to be such, upon a thorough investigation, and have disallowed it. We have not sufficient evidence before us to warrant us in saying that the masters came to a wrong result.

Incidental expenses.

The bill is brought to enforce the security provided by the instrument of July 9th, 1850. The original lease of August 24th, 1849, made no provision in this respect. The rights and duties of the parties to it rested only in the covenants it contained. Only in this latter instrument is anything provided or agreed as to *incidental expenses*. The first named instrument alone provides for security, and it specifically states what such security is for. By way of removing all ground of doubt as to the meaning of the parties in reference to the payment of the stipulated rent, it

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specifies precisely what they did mean. In the same instrument they make provision for the security now sought to be enforced; and it is security for *rent* only. The subject of the incidental expenses, which is provided for in connection with the rent in the original lease, is not mentioned, nor in any way connected with the rent, in the provision for the security in the instrument of July 9th, 1850. The orators under their bill seek to establish a priority of right over subsequent incumbrancers. Settled principles of law require them to stand upon the legitimate force of the contract creating the security. Aside from that contract, there is no ground for asserting the right to the priority which they claim. Whether as against the Vermont Central Company the provisions of the lease might not bind it to the payment of the incidental expenses, or whether, if the bill had been properly framed, a decree might not be made against that company for the incidental expenses, as well as the rents, it is of no importance to inquire. There is no ground in the contract providing for the security, nor in the bill as framed, for a decree against the trustees and bondholders, that shall embrace the incidental expenses, and put them on the same footing as the *rent* specified and stipulated in the instruments of lease.

The question of a right to enforce the security, in priority to the rights of subsequent incumbrances, stands on a different ground from the question whether the trustees might not be subjected to the covenants in the original lease. The bill is not framed with any aspect involving that question, nor with any aspect beyond the enforcement of the security for the *rent, eo nomine*, which is provided in the instrument of July 9th, 1850.

Upon the whole case we hold that the sum on which, as cost of construction, the eight per cent. is to be computed as the measure of the rent to which the orators are entitled, is one million three hundred and forty-eight thousand five hundred dollars, and that for that rent alone was security provided in and by the indenture of July 9th, 1850, and only in respect to that are the orators entitled to a decree.

In the present posture of the case, the court being unable to decide that the orators are entitled to the possession of the roads, property, etc., it seems obvious, in view of the character of the

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property and of the various interests involved, that the only proper or practicable course is to have the roads and property remain in the hands of receivers, under the control of the court of chancery. A mandate will be drawn in detail according to these views and points of decision, and sent to that court.

The decree of the court of chancery is reversed, the orators to recover their costs, and the case is remanded to that court, to be there proceeded with conformably to the mandate aforementioned.

CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF THE

STATE OF VERMONT, ✓

FOR THE

COUNTY OF RUTLAND,

AT THE

JANUARY TERM, 1861. }

PRESENT:

HON. LUKE P. POLAND, CHIEF JUDGE,
HON. ASA O. ALDIS,
HON. JAMES BARRETT, } ASSISTANT JUDGES.
HON. LOYAL C. KELLOGG, }

JOHN McMAHAN v. NAHUM J. GREEN.

Officer. Assault and battery. Trespass.

Every citizen is bound to assist a known officer in making an arrest when called upon so to do, nor is he bound to inquire into the regularity or legality of the process in the hands of the officer.

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A known officer had in his hands a warrant against John McManus. He arrested upon the warrant the plaintiff, John McMahan, and the defendant, at the request of the officer, assisted in making the arrest ; *Held*, that although the arrest was illegal, the request of the officer was a full justification to the defendant, and he was not liable for false imprisonment in assisting in making the arrest.

TRESPASS for assault and battery and false imprisonment. The facts sufficiently appear in the opinion of the court. The court at the January Term, 1861, PIERPOINT, J., presiding, directed a verdict for the defendant, to which the plaintiff excepted.

Thrall, for the plaintiff.

Everts, for the defendant.

ALDIS, J. { The plaintiff was arrested by William Edgerton, a deputy sheriff, upon a warrant issued against John McManus for an assault with intent to commit rape. The defendant was required by the officer to assist him in making the arrest, and in obedience to such command he accompanied the officer in making the arrest and in committing the plaintiff to prison. The plaintiff's name is John McMahan instead of John McManus, and upon this ground he claims that the warrant was void against him, and that the defendant is liable to an action of trespass and false imprisonment in thus assisting the officer.

When a warrant or other process is regular on its face it protects the officer who does what it enjoins. He is not required to investigate the proceedings anterior to the warrant to see that they are regular and valid.

But in civil cases, where there is misnomer in mesne process, which has not been waived, though it be executed upon the person against whom it was intended, the officer will be liable in trespass. Thus in *Shadgett v. Clipson*, 8 East. 328, where *Josiah Shadgett* was arrested upon process against him by the name of *John*, the officer was held liable in an action for false imprisonment. The court said process ought to describe the party against whom it is meant to be issued ; and the arrest of one person cannot be justified under a writ sued out against another. >

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See also 2 Taunt. 400, 6 T. 234; and 1 B. & A. 647; 1 Ch. Pl. 213; 7 Cow. 332. But when the party so misnamed in the writ omits to plead it in abatement, and suffers judgment to pass against him, it is a waiver of the defect and the judgment is valid against him. 1 Mass. 76.

In *Griswold v. Sedgwick*, 6 Cow. 456, process was issued from a court of equity to attach for contempt *Samuel S. Griswold*, and was served upon *Daniel S. Griswold*, the person really in contempt and against whom the order was made. As soon as the officer discovered the mistake in the attachment the prisoner was discharged. He thereupon brought trespass for false imprisonment against the officer, and it was held he was liable.

[No case has fallen under our notice where the same rule has been applied to process in strictly criminal cases. There seem to be some reasons why it should not be so applied. The facility with which criminals pass from one part of the country to another, where they are wholly unknown, the various names by which they pass, and the difficulty of ascertaining their true names, especially of foreigners, French and German, whose names would be likely to be misunderstood and misspelled, and the importance of promptly arresting them, and, to that end, of protecting officers in so doing would seem to furnish some reasonable grounds for adjudging that when the person who is really meant is arrested, though by a wrong name, such slight error, so harmless and so easily rectified, ought not to subject the officer to a suit. Should such an exception be sustained, it could only be probably where the name was unknown or concealed or falsely given, and the true party against whom the process was issued had been arrested. In such case perhaps the mythical John Doe, who appears here in the complaint, might properly be held to represent the true name of the respondent. But it is not necessary to settle that point, as there is another which is decisive of this case.]

[Sheriffs and other officers are by statute empowered to require suitable aid in the execution of their office in apprehending criminals. Comp. Stat. chap. 13, sec. 11. When the defendant was called upon by the sheriff in this case to assist him in arresting the plaintiff, he was not at liberty to refuse. Nor could he demand of the sheriff an inspection of the warrant under which

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he was acting, in order to see by what authority he was proceeding, and whether in his judgment it would be safe to assist him. It was enough that he was the sheriff, (or deputy sheriff,) a *known public officer*, who called on him for aid in the execution of his office; it was his duty to yield immediate obedience to the demand. The nature of the case requires that there should be no delay in rendering the requisite assistance; no nice inquiries into the written authority of the sheriff to do what he is doing. It is sufficient that the officer asks for aid in a matter in which he has by law a right to ask for aid, and that he is a known public officer. The person, who is thus called on, is protected by the call from being sued for rendering the requisite assistance. If the officer has no warrant, or authority that will justify him, he may be liable as a trespasser; but the person who is called upon for aid, having no means of knowing what the warrant is by which the officer acts, and who relies upon the official character and call of the sheriff as his security for doing what is required, is clearly entitled to protection against suits by the person arrested. The necessity of the case forbids that he should have the means of knowing or the time to inquire into the anterior proceedings. Nor does the law intend that any such inquiry should be tolerated, or that men called upon to aid officers in arresting criminals shall stop to examine papers and to take counsel as to the legality of the process under which the officers act. This statutory right of an officer to call for aid is but an affirmance of the common law. Bac. Abr., Tit. Sheriff, N. 2.

So, too, it is held at common law, that those who obey the command of the sheriff in arresting criminals will be thereby justified, though the sheriff be acting without authority. Hamm. N. P. 63-65.

In *Hooker v. Smith*, 19 Vt. 151, this doctrine is expressly recognized by Judge HALL, although it was not the point decided in the case. The doctrine stands upon the ground upon which sheriffs are protected in the execution of a precept regular on its face, though the prior proceedings may be invalid, viz: that they are not expected to know, and have no means of knowing what the previous proceedings were, and that in order to have the laws promptly executed, officers must execute process legal on its face

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without further inquiry. The policy of the law and justice to the defendant alike demand that his justification of the alleged trespass and imprisonment, viz: obedience to the official demand of the sheriff for his aid in arresting the plaintiff for crime, should be sustained. }

In civil cases merely, the sheriff having no authority to call for such aid, when there is no breach of the peace or other criminal offence, the persons who interfere and aid the officers are said to be liable. Archibald's Practice 858.

But that would not affect this case, as it was for the arrest of a criminal. On this subject see also 9 A. & E. 840, 846; 1 B. & A. 652; 7 B. & C. 486; 3 Dowl. 678, *Finch v. Cocken*.

Judgment affirmed.

EZRA BACON v. THOMAS F. VAUGHN.

Evidence. Auditor. Book Account.

The entries of a deceased Clerk made upon the books of the master in the usual course of business, are evidence in favor of the master against a third person.

Nor does it make any difference that neither of the parties have any present recollection as to the subject matter of such entries.

The weight, that should be given to such evidence, is exclusively a matter for the consideration of the Auditor.

When the Auditor reported that certain items of account presented before him by each party were not charged by either of them at the time they accrued, but that they were considered and made even by them at the time, it was held that the finding of the Auditor must be treated as conclusive.

BOOK ACCOUNT. Among other things the auditor reported, that the plaintiff and defendant presented and claimed pay on two accounts. So far as they accrued at all, they arose from the receipts and disbursements of the respective parties, on

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account of a tract of land which they owned as tenants in common. The parties were both men of extensive business, and were in the habit of keeping regular accounts, but their transactions in relation to such common property were never entered upon their books on either side, and the accounts in question were made up at or about the time of their accounting before the auditor, and, from the other evidence in the case, the auditor found that said transactions were adjusted and made even between the parties from time to time and at and about the times when they accrued, and that neither party was, at the time of hearing indebted to the other on account of them.

The defendant claimed pay among other items for one as follows :

“March 6th, Chopping 8 cords of wood - - 5 00.”

In respect to which the auditor reported that neither of the parties had any recollection of the performance of this service, and the only evidence upon which it was allowed, was, that it appeared regularly entered upon the defendant's book in the hand writing of a deceased clerk of the defendant, in the ordinary course of business.

The plaintiff filed exceptions to the auditor's report, which sufficiently appear in the opinion of the court.

The exceptions were overruled by the county court, and judgment was rendered on the auditor's report for the defendant, to which the plaintiff excepted.

R. R. Thrall, for the plaintiff.

Wm. C. Kittridge, for the defendant.

KELLOGG, J. In this cause, the defendant filed his declaration on book account against the plaintiff, in offset, under the statute ; and the questions now made arise on exceptions taken by the defendant to the report of the auditor in this cross action of book account.

The defendant excepted to the decision of the auditor allowing a charge of five dollars in the account of the plaintiff against the defendant “for chopping eight cords of wood.” In respect

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to this charge, the auditor's report states that neither of the parties had any recollection of the performance of this service, and that the only evidence upon which it was allowed was that it appeared to have been regularly entered on the plaintiff's account book, in the hand-writing of a deceased clerk of the plaintiff, in the ordinary course of business. Unless this evidence is to be treated as having no tendency to prove the charge, the decision of the auditor is to be regarded as conclusive, and not open to revision or exception; and the only question which can now be raised upon this part of the case is whether the evidence had any tendency to support the charge. In the action on book account, the original books of the parties have always been regarded as instruments of evidence, and are so recognized by the statute. The fact that the entry of this charge was made by a person in the plaintiff's employment, whose appropriate business it was to make entries on the plaintiff's books in the ordinary course of business, serves to give character to it, and entitles it to be taken into consideration as evidence. 1. Greenl. Ev. Sec. 117. In the case of *Cummings & Manning v. Fullam*, 13 Vt. 484, it was held that entries of this character were admissible as evidence although made by *living* clerks, who were not produced as witnesses. From the necessity of the case, the reason for the admission of such evidence is much stronger in the case of an entry made by a *deceased* clerk. In *Pitman v. Maddox*, Lord Raym. 782, (2 Salk. 690, S. C.,) in an action upon a tailor's bill, a shop book was produced, written by one of the plaintiff's servants who was dead; and, upon proof of the death of the servant, and that he used to make such entries, it was allowed to be good evidence of the delivery of the goods, and HOLT, C. J., said this was as good proof as the proof of a witness' hand (who was dead,) subscribed to a bond. We have no doubt that the auditor was justified in receiving and considering this evidence, and if there were any facts or considerations which would detract from the weight or character which would otherwise be given to it, they should have been submitted to his consideration on the hearing before him. No principle is more familiar, or better settled, than that when any evidence is given before an auditor which has a legal tendency

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to prove a fact in controversy before him, his decision upon the weight and sufficiency of the evidence is as conclusive as the finding of the facts by the court, or by the verdict of a jury, would be, and it cannot be made the ground of an exception to his report. It is not within the province of the county court, or of this court, to revise the decision of an auditor in respect to the weight and sufficiency of competent legal evidence, and we think that this exception does not rest on any ground which is tenable. It can make no difference whether the auditor came to his result upon direct and positive testimony, or by inferring facts which might be legitimately inferred from the evidence in the case. In either point of view, his decision does not furnish matter for exception. *Kent v. Hancock*, 13 Vt. 519.

The defendant also excepted to the report of the auditor, for the reason that the auditor rejected that part of the defendant's account against the plaintiff, which accrued from transactions between them on account of a tract of land which they owned as tenants in common. The statement in the defendant's exceptions, that there was no evidence before the auditor tending to prove the facts found and reported by him in respect to the subject matter of this exception, is not only unsupported by the report of the auditor, but it is wholly inconsistent with the statements of the report. For aught that appears from the report, the decision and findings of the auditor in reference to the subject of this exception rested upon competent and sufficient evidence; and this should be presumed until the contrary is properly shown. We find no question of law arising upon the report in this particular.

No other exceptions were taken by the defendant to the report of the auditor; and these exceptions having, in our opinion, been properly overruled, the judgment of the county court in favor of the plaintiff on the report is affirmed.

McMahan v. Edgerton.

JOHN MCMAHAN v. JACOB EDGERTON.

Officer. Process. Pleading.

An officer is not liable for the penalty imposed by the Statute for neglecting or refusing to give a person a copy of the process by virtue of which he is arrested, unless he have process for such arrest in his hands at the time.

When an officer arrested a person on a warrant returnable forthwith before a Justice of the Peace, and the Justice was absent at the time, and the officer placed the respondent in jail for safe keeping until the return of the Justice, and for no other purpose, and did not leave with the jail keeper any warrant or copy, and thereupon the respondent demanded a copy of the process, on which he was detained, of the jail keeper, who was also sheriff of the county, and tendered the fees therefor, and the jail keeper neglected for more than six hours to give him a copy, it was held the jail keeper did not thereby become liable for the penalty imposed by the statute for neglecting or refusing for more than six hours after demand, to give the prisoner a copy of the process by virtue of which he was detained.

When the declaration omitted to aver that the defendant had process or a warrant for detaining the prisoner in his hands at the time of the demand for a copy, and no demurrer was interposed; it was held, nevertheless, that plaintiff was bound to show that fact on trial, as constituting an essential element in the offence charged.

This was an action to recover a penalty under a statute law of this State, as follows:

"Any officer who shall refuse or neglect for six hours, to deliver a true copy of the warrant or process by which he detains any prisoner, to any person who shall demand such copy and tender the fees therefor, shall forfeit and pay to such prisoner the sum of two hundred dollars." See General Statutes, chap. 28, sec. 43.

Plea, general issue. Trial by jury. Upon the trial of this cause, the plaintiff introduced evidence tending to prove that he, the plaintiff, on the 14th day of October, 1859, was confined a prisoner in the common jail in Rutland, and in the custody of the defendant, who then was sheriff of the county of Rutland, and keeper of the jail; that on that day he made a demand of the defendant of a true copy of the warrant or process by which he detained him, the plaintiff, in prison in said jail, and tendered him five dollars for the fees for said copy; and that the defend-

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ant neglected and refused, for the space of more than six hours, to furnish said copy. Thereupon the defendant contended that the plaintiff was not entitled to recover, for the reason that he did not prove that the defendant had any warrant or process upon which he detained the plaintiff in prison, and the court decided that it was incumbent upon the plaintiff to prove that the defendant had a warrant or process against the plaintiff at the time of making said demand and tender, and that the court should so instruct the jury. And thereupon, plaintiff, by leave of court, introduced evidence tending to prove that on the 11th day of October, 1859, the defendant had in his hands a warrant, issued on the complaint of the state's attorney of said county, and signed by M. G. Everts, justice of the peace, against John Doe, alias ——— (the plaintiff's name not being on the warrant;) that on that day he delivered said warrant to William G. Edgerton, then a deputy sheriff under the plaintiff, and directed him to go to the state's attorney for instructions, which he did; that on the same day the said William G. Edgerton arrested the plaintiff upon said warrant, as directed by said attorney, and confined him in the jail for safe keeping, until the return of the magistrate who signed said warrant, and who was then absent from town when he, the plaintiff, was confined, from the 11th to the 17th day of October, 1859, inclusive, (said magistrate still being absent) when he was discharged without any examination, by order of the state's attorney; and that no copy of the warrant was ever left with the defendant. The warrant and complaint were then introduced, upon which no return was made. No evidence was introduced by the defendant. Upon the introduction of this evidence the court decided that the defendant was not liable to the penalty claimed by the plaintiff, and directed the jury to return a verdict for the defendant, and they did so. To the several decisions of the court, and their instructions to the jury, the plaintiff excepts.

——— for plaintiff.

H. Allen for the defendant.

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BARRETT, J. This is an action on the statute for the penalty imposed, in case a person detaining a prisoner shall, on demand and tender of fees, refuse or neglect to deliver a true copy of the warrant or process by virtue of which he detains such prisoner. It is clearly a *penal* action, and, according to many decided cases, stands upon the same rules of evidence as any other form of criminal prosecution. It is obvious, therefore, that the refusal or neglect, by which the forfeiture is to be incurred, must be the personal, voluntary act of the person sought to be charged; and that the plaintiff must show by the requisite proof all the facts essential to constitute the culpable refusal or neglect contemplated by the statute.

The very idea, upon which this duty of the officer having the prisoner, to give the demanded copy rests, necessarily implies that such officer has, or, but for his own act in depriving himself, would have, the warrant or process of which he is required to give a copy. Hence, in order for the defendant to be regarded capable of refusing or neglecting to comply with the demand, it should appear that the defendant had, or, having once had, wrongfully had deprived himself of, such process or warrant. This being an essential element of the plaintiff's right to recover, it devolves on him to make affirmative proof of the fact.

The plaintiff's counsel undoubtedly entertained this view, and accordingly gave evidence to show that the plaintiff had been arrested upon a warrant of a justice of the peace, by a deputy sheriff, who was holding him in custody to have him before the justice, agreeably to the precept of the warrant; that in the absence of the justice, and awaiting his return, the deputy sheriff kept his custody of the plaintiff, by putting him into the county jail.—not as an act of commitment required by the warrant, but only as a convenient means of maintaining his custody.

Of course, it was of the same character as if the deputy sheriff had confined the plaintiff for safe keeping in any other room or building, in charge of any other person. The evidence also showed that the deputy sheriff left no copy of the warrant with the defendant, and made no return upon the warrant. As the precept of the warrant only required the officer to arrest the

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plaintiff and have him before the justice, of course the only proper return would have been in pursuance of such precept; and to this end, it could not be requisite to set forth either the mode of the arrest, or of the means by which the custody had been kept. Whether he would give a copy of his warrant to the jailor or not was a matter entirely within the control of such officer. If he had done so, whether it would have varied the legal character of the custody he was keeping of the plaintiff need not now be determined or discussed.

The plaintiff himself having thus shown that there never had been delivered to the defendant any precept or process, or any copy thereof, on which the plaintiff was detained as a prisoner, it could not properly be held that the defendant refused or neglected to give the copy upon the lawful demand thereof, in the obvious sense and intent of the statute.

The lawfulness of the imprisonment is not now the subject of enquiry, nor whether there is any official liability of the defendant for the acts of his deputy in making the arrest and keeping the custody of the plaintiff under the warrant. This suit is brought exclusively on the section of the statute recited in the declaration, and for the forfeiture therein provided.

The point taken by the learned counsel for the plaintiff, that he was not bound to prove that the defendant had a warrant or process, by which he detained the prisoner, because he had not averred it in his declaration, we cannot regard as tenable. Though the defendant went to trial without demurring to the declaration for the want of that material averment, we think the objection might be taken on the trial, on the failure of the plaintiff to prove the fact. It would be far from certain that a verdict for the plaintiff would have withstood a motion in arrest, even if the fact itself had been proved — this being in the nature, and governed by the rules of criminal procedure.

It therefore does not become the plaintiff to complain that the objection was taken at a stage of the case that afforded him an opportunity to bring his proofs up to the requirements of the law, even though he had failed to make the necessary averments in that respect in his declaration. A conclusive test of this point would be presented, if the defendant, instead of taking the objec-

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tion upon the state of the plaintiff's evidence, had offered under the general issue, to show that the deputy did not deliver a copy when he put the plaintiff into jail, in connection with the other facts now shown by the plaintiff's evidence as to the occasion and manner of his being put in and detained. Upon the view we have already expressed, as to what is essential in order to render the defendant capable, in the given case, of neglecting or refusing to give the copy, so as to incur the forfeiture, it is obvious that we should regard such evidence admissible, and if the fact should be proved, it would constitute a good defence.

We see no error in the rulings of the county court, and the judgment is affirmed.

HENRY KEYES v. WESTERN VT. SLATE COMPANY.

Recoupment. Damages. Offset. Pleading.

In a suit for work and labor done or goods sold and delivered, the defendants under the general issue may reduce the damages by showing the work unskillfully done, or the goods not as good as warranted; but it seems that a defendant cannot, under the general issue, to reduce damages, show a breach by the plaintiff, of stipulations independent of those on which the plaintiff claims to recover, even though they are included in the same contract on which the suit is brought.

Under our statute, unliquidated damages, growing out of contract, may be pleaded in offset.

When by the provisions of a contract, the defendants were bound to repair a drain on premises leased to the plaintiff, and the plaintiff notified them it was out of repair, *Held*, if they neglected to repair it, the plaintiff should do so, and the measure of damages for so doing would be the cost of repairs; but when the defendants, after notice to repair, promised from time to time they would repair, but neglected so to do, *Held*, the plaintiff was entitled to recover the actual damages sustained by him by such neglect.

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This was an action of assumpsit; plea, general issue, with special notice and set off, tried at January term, 1861, PIER-POINT, J , presiding.

The plaintiff gave in evidence a written contract, accompanied with evidence tending to show that he entered upon the premises described in the contract, and occupied for one year, (when the term was ended, pursuant to notice given, three months previously, by the defendants;) that he performed, during said year, the stipulations of said contract on his part, and that the defendants failed to supply the derrick, and "to put the pumps in order, and to have the drain in repair," as expressed in said contract, and that he suffered pecuniary loss and damage thereby.

Under the general issue and notice, the defendants offered evidence to prove that the plaintiff, in the execution of said contract on his part, as far as he performed it at all, worked the quarry therein mentioned unskillfully, carelessly, and in an unworkmanlike manner, so as greatly to lessen its value to the defendants, and that the same was surrendered and delivered up by the plaintiff at the end of the term, not in as good condition as when received by him at the commencement of said term, and that the damages resulting to the plaintiff therefrom, amounted to a large sum. This evidence was offered with a view to a recoupment of the plaintiff's damages, if he should recover any. It was objected to by the plaintiff, and excluded by the court.

The plea and notice and plea in offset were filed on the trial by the consent of the counsel of the plaintiff, with the agreement that evidence might be given to support them, the same as if they had been filed within the time required by the rule. Under said plea in offset, the defendant offered evidence to show the failure of the plaintiff to perform said contract as stated in said plea, and to show unliquidated damages resulting to the defendants therefrom. This evidence was objected to by the plaintiff, and excluded by the court.

The defendants gave evidence to show that they repaired said drain after the commencement of said term, at a cost of about sixty dollars; but the plaintiff gave evidence tending to show that early in February he called on the defendants to make such repairs, and that said repairs were neglected by the defendants

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for some two months after they reasonably ought to have been made, and that in consequence he was unable to work said quarry, and thereby his principal damages accrued.

The court were requested by the defendants to instruct the jury that the measure of damages to the plaintiff for this neglect was the cost of the repairs, and not the detriment which he might have suffered from the drain remaining out of repair during all that time. The court refused so to charge the jury, but did charge them that if they found that the drain was out of repair when the contract was entered into, the defendants were bound by the contract to repair it within a reasonable time, at least after the fact was brought to their knowledge; if, after the plaintiff gave the defendants notice that the drain was out of repair, (as it was conceded he did,) the defendants recognizing their obligations to repair, agreed from time to time to repair it, and commenced doing so, and finally did repair it, as the evidence tended to show, (and about which there was no controversy;) but failed and neglected to repair it within a reasonable time after such notice; then the defendants were liable to the plaintiff for such damage as he sustained, as the immediate and necessary result of his not being able to work the quarry, as he had the right by his contract to do, and as he wanted to do, during the period of such unreasonable delay.

To which said several decisions and charge, and refusal to charge, the defendants excepted.

Linsley & Prout, for defendants.

H. G. Wood, with whom was *E. J. Phelps*, for plaintiff.

POLAND, CH. J. The English courts formerly held that in actions to recover for services performed, or for goods sold, where there was a specific contract as to the price, the defendant could not reduce the plaintiff's recovery below the stipulated price, by proving that the service was unskillfully or negligently performed, or that the goods sold were not of the quality represented by the seller, and were of less value than the contract price; but that in such cases the defendant must resort to his

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cross action to recover damages of the plaintiff for his negligence, or violation of contract.

But the law has long been settled differently both in England and in this country, and in all such cases the defendant is now allowed to set up such matters in reduction of the plaintiff's damages. It seems, too, to be now settled, that in actions to recover for the performance of services, or for the price of goods or chattels sold, and where a certain price has been agreed to be paid, the defendant may show under the general issue that the plaintiff made a warranty, and that it has been broken, and reduce the plaintiff's recovery to the extent that the defendant has sustained loss by such breach of warranty. *Allen v. Hooker*, 25 Vt. 138.

The defendant now claims that this doctrine of allowing a defendant to show in reduction of the plaintiff's claim, damages occasioned by the plaintiff's failure to perform his contract, has been extended far enough to enable a defendant to set up the violation of distinct and independent stipulations by the plaintiff, in a contract, in answer to damages claimed by the plaintiff for the non-performance by the defendant of the stipulations of such contract on his part; that however independent and distinct the several stipulations or covenants of the parties may be, if they are contained in the same instrument, the defendant may reduce the plaintiff's recovery by showing the damages he has himself sustained by the non-performance on the part of the plaintiff, and this under the general issue. We do not think the doctrine has ever been carried to that extent in this state, and we doubt if it is yet settled to that extreme in New York, where the courts have gone beyond all others in favor of what is there termed the *recoupment* of damages.

As only three members of the court have participated in the decision of this case, and we are not precisely agreed in our views of what is the exact limit of this doctrine here, we do not attempt to lay down any rule, as we do not find it necessary for the decision of the case.

2. We are satisfied that the damages, which the defendants claimed to have sustained by breaches of the contract by the plaintiff, were such claims as the defendant might, under our

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statute of offsets, set up by plea, and that they should have been allowed to do so.

The objection made to allowing the same to be pleaded in offset is, that the damages are entirely open and unliquidated. Under the English statute of offsets this would be a good objection, and so in most of the states whose statutes, like the English, only allow liquidated claims to be pleaded in offset.

But our statute contains no such provision, but allows the defendant to plead in offset whenever the plaintiff is indebted to him on contract, express or implied. The plaintiff claims that the term *indebted* should be construed so narrowly as to really include only such claims as are liquidated. But we think it has a broader construction, and means the same as liable to the defendant on contract express or implied. This same question has been before the court recently, and this construction was given to the statute. *Hubbard v. Fisher*, 25 Vt. 539.

It is said in that case, "an offset in this state is not required to be liquidated in order to be pleaded in setoff, as is the rule at common law, but here the plea is a mere declaration, and may cover any matter of contract, not expressly excepted in the statute."

It is urged that to allow such claims to be pleaded in offset, when the damages are uncertain and unliquidated, will lead to great confusion and perplexity in trials, but we do not perceive it, or how any greater difficulty can arise in the trial of such a claim on a plea in offset, than where it forms the ground of an independent action. It is equally within the beneficial purpose of the statute of offsets, preventing a multiplicity of actions, and saving to defendants the advantage of satisfying the plaintiff's demand with his own debt, instead of being compelled to advance the money, and then resorting to the expense and risk of another litigation to recover his claim against the plaintiff. It is said this construction will allow claims, really for torts, to be litigated upon pleas in offset; that negligence and malfeasance of attorneys and physicians can be sued for in assumpsit, and therefore be pleaded in offset. But the answer to this suggestion is, that though by a sort of legal fiction such negligence has been treated as a breach of an implied promise arising from pro-

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fessional employment, still the claim is really in tort for negligence.

In this case, however, the defendants' claim is really for a violation of contract, for which no action but one *ex-contractu* could be brought, and the claim is precisely of the same nature as that of the plaintiff for which he seeks damages by his suit.

3. The rule of damages laid down to the jury, we think, was substantially correct, though not very fully expressed in the exceptions. If when the plaintiff requested the defendants to repair the drain, they had refused to do so, it would have been the duty of the plaintiff himself to have done it, and all he could have recovered would have been the costs of the repair. He could not in such case lie by, and incur loss for want of the repairs, far beyond the cost of fixing it, and make the defendants liable. If the defendants wrongfully refused to repair, still it was the duty of the plaintiff to conduct like a reasonable and prudent man, and take the course that would be least detrimental to himself, and to the defendants. But if the defendants, on having notice to repair the drain, admitted their liability to repair it, and promised to do so, and thus kept the plaintiff from making the repairs himself, and thus prolonged the period of loss to the plaintiff, so that it exceeded the cost of the repairs, that loss justly should fall on the defendants. It was rather a question as to whether the plaintiff acted in good faith, and with fair and reasonable prudence, in the course he took in waiting for the defendants to repair, under their assurances, instead of proceeding to make them himself. The defendants when called on should have immediately proceeded to make the repairs themselves, or else have refused, so that the plaintiff could have made them himself. If they omitted to make them, on being called on, and kept the plaintiff from doing it by false and delusive promises, they cannot complain of being made liable to loss occasioned by the delay.

For the exclusion of the defendants' evidence under their plea in offset, the judgment is reversed.

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ELISHA A. MARTIN v. L. POTTER & CO. AND TRUSTEES AND CLAIMANTS.

Trustee Process. Foreign Assignment.

When the defendants, who were citizens of New York, assigned their property for the benefit of their creditors, and among the claims so assigned was a debt due to them from the trustees who were citizens of Vermont, but before notice to the trustees by the assignees, the debt, due from them to the defendants, was attached by trustee process by the plaintiff who were creditors of the defendants; *Held*, the plaintiffs were entitled to hold the debt rather than the assignees.

TRUSTEE PROCESS. It appeared that on the 7th day of January, 1858, the defendants, L. Potter & Co., made an assignment of their property; that said assignment was duly executed by said Potter & Co., and recorded, and the said claimants accepted of the assignment, and claimed to hold the property of said Potter & Co., under and by virtue of said assignment. It further appeared that the plaintiff, and L. Potter & Co., and said claimants, are all resident citizens of the state of New York, and that the assignment was made in New York; that the trustees in this case are resident citizens of Vermont, and contracted the debts for which they have disclosed as due to L. Potter & Co., in the state of New York; that the trustee process, which is made a part of this case, was issued in this state, and the suit instituted by the plaintiff, and due service made on the trustee, and no notice had been given to, or had by, said trustees at the time of the service of the trustee process upon the trustees, of any assignment made by said Potter & Co., to the said claimants, or of any transfer of the claims in favor of L. Potter & Co., against said trustees.

The court, at the September term 1859, PIERPOINT, J., presiding, upon the above statement of facts, decided *pro forma*, that the trustees were chargeable in the amounts disclosed by them, and that judgment be entered against the defendants, and the trustees, and the claimants.

To the decision of the court in deciding the trustees liable in this case, the claimants excepted.

Linsley & Prout, for claimants.

I. T. Wright and E. N. Briggs, for plaintiff.

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ALDIS, J. In *Hanford v. Paine and Trustees*, 32 Vt. 442, it was held that foreign assignments of property within this state, though not pursuing the provisions of our statutes as to assignments, if valid where made, would be valid here. At the same term in *Rice & Danenbaum v. Curtis*, 32 Vt. 460, it was adjudged that the creditors of the assignor might lawfully attach and hold personal property transferred by a valid foreign assignment, where the assignee had not taken possession of the property assigned. This decision rests upon the settled policy of our state, that sales and assignments of personal property, unaccompanied by a visible change of possession, will not protect the property against attachment by the creditors of the original owner.

By our statutes, choses in action and negotiable promissory notes over or under due, are liable to be attached by the trustee process, unless they have been negotiated and notice thereof given to the maker before the service of the trustee process. Debts thus become liable to attachment like personal property—and notice to the maker of their transfer, is, like the change of possession as to personal property, indispensable to protect them from being attached by the creditors of the party to whom they were originally due. This analogy between attachment of choses in action and of personal property has always been observed in this state. Thus knowledge by the creditor that the personal property has been sold, does not deprive him of his right to attach, so long as the sale is not perfected by possession in the vendee; and knowledge by the creditor that the chose in action has been transferred by his debtor is held not to be the notice required by the statute which defeats the right of attachment. There must be notice given by the assignee of the chose in action to the person liable upon it.

As these settled rules of law apply to all assignments of choses in action made in this state between our own citizens, and are founded upon the very words of the statute and the long established policy of the state, it is clear that we ought not to give to the transfer of a chose in action, made in a foreign state, greater force and reach than to one made at home. No comity can require us to abandon the settled policy and statute law of the state in

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favor of foreign vendees or assignees. The reasons set forth by CH. J. REDFIELD in *Rice & Danenbaum v. Curtis* as to personal property, apply equally to choses in action. Indeed he illustrates the reasonableness of the rule as applied to personal property by referring to the law as applicable to the trustee process in regard to choses in action, and thus by anticipation decides the very question before us.

It is true, that the possession of personal property by the vendor gives him a credit in the eyes of the world, and that this reason does not apply to debts. But there is another reason for the policy which requires possession to accompany sales—viz: the temptation to, and the opportunity for, fraud, when possession is not changed, which applies with equal force to the secret transfers of debts without notice to the debtor. There can be no visible possession of a debt. But as one wishing to attach, and therefore to ascertain whether a debt had been transferred, would naturally inquire of the debtor, and as one taking an honest assignment of a debt would naturally notify the debtor, the law requires such notice to be given, and such notice is in lieu of change of possession. These views may be supposed to have conduced to the adoption of our statute; but whatever the reasons, we think the harmony of the law requires that the same rule that applies to the attachment of chattels, should apply also to the attaching of debts by trustee process; and that possession in the one, and notice in the other, must be required to perfect the right of the vendee or assignee as against creditors' attachments.

Judgment affirmed.

 BANK OF RUTLAND v. WOODRUFF & MARSDEN.

Bills of Exchange. Acceptance. Assumpsit. Collateral Securities.

The drawees of two bills of exchange, residing in the State of New York, procured them to be discounted at the plaintiff's bank in Vermont, through an agent of the bank in New York. The other parties to the bills were mere accommodation parties for the drawees, and the money was obtained on the

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bills by the drawees, for their own use, they assuring the agent of the bank at the time the bills were left with him, that they should be paid; but no written acceptance was made on the bills by the drawees as required by the law of New York, to bind a party as an acceptor; *Held*, that the bank was entitled to recover the amount of the bills from the drawees in an action upon the general counts in *assumpsit*, as for money loaned upon deposit of the bills as collateral security.

A creditor, holding collateral securities for his debt, need not surrender such securities to the debtor in order to enforce his debt directly against him. The creditor is entitled to hold them until he gets his pay, and then the securities belong to the debtor.

Where the drawee of a bill, not accepted by him in writing, has it in his possession and procures another to discount it, or advance the money upon it to him, the law in this State would from that fact imply an *acceptance* of the bill by the drawee, without any express language to that effect; and where the drawee resides in another state and procures the presentment of the bill for discount, and the money upon it in this state, through an agent of the party discounting, the effect would be the same.—POLAND, Ch. J.

ASSUMPSIT on two bills of exchange, and on all the common counts. Plea, the general issue, and trial by the court at the September Term, 1860,—**PIERPOINT, J.**, presiding.

The plaintiff introduced in evidence the bills of exchange declared on, with certificates of protest for non-payment attached, and also gave evidence from which the court found the following facts: The defendants were copartners in the produce trade, purchasing in the country, with their house of business in New York. The bills were made at Pawlet, in this state, (where they bear date) Nov. 8th, 1859, by one John J. Woodard as drawer, addressed to the defendants, at 18 Front Street, New York, as drawees, and endorsed, one by John Stearns and the other by James Mendon and David Woodard. The bills were so made and endorsed at the request of the defendant, Marsden, and for the sole accommodation of the defendants, as the drawer and indorsees were all informed at the time the bills were made. On the day of their date the defendant, Marsden, and one Carvet, a clerk of the drawees, went with the bills to a Mr. Smith, in Granville, in the State of New York, where Smith resided, with a view to negotiate the bills and obtain money on them for the use of the defendants. Smith was at the time an agent of the plaintiff to exchange the money of the bank and purchase checks on other banks, and had also authority to receive, and had been

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in the habit of receiving paper for discount and forwarding it to the plaintiff to be discounted; and this and the plaintiff's course of dealing with Smith were known to the defendants. In relation to such paper the plaintiff was accustomed to rely much on Smith's judgment and knowledge of the parties and circumstances under which it was made. The bills in question were left with Smith at this interview, with the understanding between him and Marsden that Smith would get the money on them from the plaintiff the next day, (Nov. 9th,) and send it to Marsden at Whitehall, Marsden at the time assuring Smith that the bills should be paid, and stating also that the drawer was doing business and paying out considerable money for the defendants. Smith was at the Bank on the 9th of November with the bills, and communicated to the cashier what had transpired between himself and Marsden in relation to sending the money to Whitehall, but not what had been said as to the bills being paid. The bills were thereupon discounted by the plaintiff, and the cashier immediately forwarded the money for their amount to Marsden at Whitehall, according to Marsden's directions to Smith. The money was duly received there by Marsden, and by him immediately appropriated to the use of the defendants.

The defendants introduced in evidence a statute law of the state of New York, providing among other things that no person within that state should be charged as an acceptor on a bill of exchange, unless his acceptance should be in writing, signed by himself or his lawful agent.

The court decided that the plaintiffs could not recover on the counts against the defendants as acceptors, but were entitled to recover on the common counts, and rendered judgment for the amount expressed in the two bills of exchange, with interest, to which the defendants excepted.

H. Allen, for the defendants.

S. H. Hodges and *E. Edgerton*, for the plaintiff.

POLAND, Ch. J. The county court decided that the plaintiffs could not recover upon their special counts against the defend-

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ants as acceptors of the two bills; but allowed them to recover on the money counts. This decision was doubtless made on the ground that the facts did not show a legal acceptance by the defendants, which there must be in order to make them liable as parties to the bills. If, however, the facts found by the county court, and placed upon the record, constitute a legal acceptance by the defendants, the judgment of the county court might be sustained on that ground, for it is well settled that the acceptor of a bill stands like the maker of a note, as the party apparently ultimately liable upon it, and may be made liable on the general counts. The judgment of the county court which we are to examine, is the judgment for the plaintiffs on the general counts. If that was right, on any ground that appears in the case, it should be affirmed. It is well settled in England that a parol acceptance of a bill is binding; and it has been so decided in this state. *Fisher v. Beckwith*, 19 Vt. 31.

But the defendants say, that if these bills were ever accepted by them, the acceptance was in New York, and that by the law of that State a parol acceptance is not good. It seems to us that upon the facts stated in the exceptions, it might be very justly claimed that the bills were accepted here. Where a party having in his possession a bill drawn upon himself, procures another to discount it, or advance the money upon it to him, the law would from that fact imply an acceptance by him, without any express language to that effect.

The presumption upon the face of a bill of exchange in common form is, that the drawer has funds in the hands of the drawee, with which to make payment, and the bill directs him to pay the same to the holder. When, therefore, the drawee himself procures another to advance the money upon it, it is an implied admission on his part that he has the funds to meet it, and that it will be duly met at maturity.

The defendants presented the bills to Smith, the plaintiff's agent in New York, for discount, but he did not discount them, and the defendants left the bills with him to carry to the bank and get them discounted there; and this was done by Smith. This, of course, is the same as if the defendants had in person taken the bills to the bank and received the money on them.

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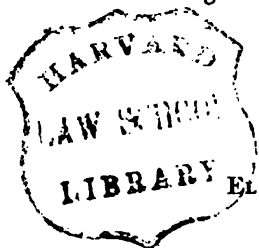
The defendants' express promise to Smith, that the bills should be paid, was made in New York, and cannot be treated as an acceptance on account of the law of that state. But, without regard to any acceptance by the defendants, we think the plaintiffs entitled to recover for the money advanced to the defendants. The exceptions find that both the drawer and endorser of the bills were mere accommodation parties for the defendants, that this was communicated by the defendants to Smith, the plaintiff's agent, through whom they procured the plaintiffs to take the bills and advance the money thereon, and they expressly promised the bills should be paid at maturity. Although what was said by the defendants to Smith in New York, must be disregarded as a strict acceptance of the bills, still for all other purposes it is the same as if said in this state and to the plaintiffs in person. The defendants obtain this advance of money from the plaintiffs by informing them that they are the parties who have the benefit of the money; that it belongs to them to repay it, and at the same time promise they will pay it, and at the same time deliver over the bills, informing the plaintiffs' agent that all parties upon it are mere sureties for them. It is impossible for us to see any ground of objection to allowing the plaintiffs to directly maintain an action to recover back the money. The general rule that a party to a negotiable instrument, who transfers it and receives pay for it, is only liable on the instrument itself, is well enough settled, and if he do not become a party by endorsement, that he is under no liability at all.

But here the defendants were not liable upon this bill at all, unless what they did amounted to an acceptance by them; they received the money and promised to repay it when the bill fell due. It looks much like a loan of money, and a delivery of the bills as collateral security for its payment. There is something very odd in the idea of a party selling an order or bill drawn on himself receiving the money upon it, and then escaping all liability whatever by refusing to honor the paper when presented. Such refusal is a direct fraud upon the party advancing the money. It is claimed, too, that if the plaintiffs held these bills as collateral security for the money merely, they should have offered to surrender them before suing for the money; that they

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cannot pursue their remedy directly for the money, and hold the bills at the same time. But it is a new doctrine to us, that a creditor holding collateral securities for a debt, cannot enforce his debt without first surrendering his securities. He is entitled to hold them till he gets his pay; then they belong to the debtor. The cases where a creditor has taken out security in place of another, but has a right to return that and resort to his original demand, have no application to the present case.

Judgment affirmed.



 ELISHA JOHNSON v. ALLEN SANDERSON, APT.

School District. Taxes.

A committee appointed by a school district to remove the school house of the district, has no authority to assess the tax to defray the expenses of such removal, or to make out the rate bill of such tax or certify to its correctness, notwithstanding the money for the purpose was voted by the district; nor can the district confer any such authority upon such committee. The prudential committee of the district is alone authorized by law (Sec. 41, Chap. 20, p. 140, Com. Stat.,) to assess and certify the tax.

Therefore a tax warrant issued to the collector of the district by a justice of the peace, upon a rate bill made and certified by the committee appointed to remove the school house, conferred no authority upon him to collect the tax, though it was assessed to defray the expenses of such removal.

The 7th section of Chap. 81, Comp. Stat. (p. 463) construed.

TRESPASS for taking the plaintiff's heifer, of the value of twenty-five dollars, on the 25th day of February, 1859.

The taking of the heifer, and the value at twenty-five dollars, were conceded, and the case was submitted to the court on the following facts: The plaintiff was a resident of school district No. 6, in Shrewsbury, and liable to be taxed therein in the years 1858 and 1859. On the 9th day of October 1858, the defendant was legally chosen collector of the district. At a legal meeting of the district held for that purpose, October 23d, 1858, it was voted to remove the school house of the district. At

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another legal meeting of the district held for the purpose, November 9th, 1858, a committee of three was chosen to remove the school house, and it was voted to raise a sum of money, not exceeding one hundred dollars, to defray the expense of removing and repairing it. The committee appointed to remove the house thereupon proceeded with the work, and after the removal was completed, and the expense ascertained (it being less than one hundred dollars,) the removing committee made up a tax bill against the persons legally liable to be taxed in the district, among whom was the plaintiff, for the amount of such expense; signed a certificate on the tax bill, and applied to a Justice of the Peace, residing in Shrewsbury, who issued a warrant to the collector, commanding him to collect the tax.

The prudential committee man of the district did not sign the certificate or give his assent thereto.

The removing committee delivered the tax bill to the defendant, with the warrant thereto attached, and the defendant called upon the plaintiff for his tax therein contained, who refused to pay it, and the defendant by virtue of the tax bill and warrant, seized the heifer in question, and advertised and sold her according to law, to satisfy the tax.

Upon these facts, the court, at the March term, 1860, PIER-POINT, J., presiding, rendered judgment for the plaintiff for the agreed value of the heifer, to which the defendant excepted.

Sewall Fullam, for the defendant.

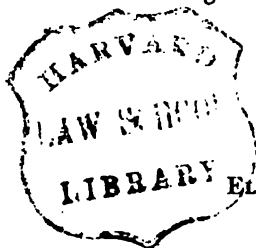
E. Fisher, for the plaintiff.

ALLIS, J. When a school district has voted to raise money by a tax on the lists of its inhabitants, the next step is for some proper authority to see that the amount so voted to be raised shall be justly apportioned on the lists of the inhabitants, and that a rate bill containing the names of the inhabitants, and the amounts which they are respectively liable to pay upon their lists towards such tax, be made out. This office is, by the 41st section of our statute relating to common schools, confided to to the prudential committee. They are authorized "to assess a

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cannot pursue their remedy directly for the money, and hold the bills at the same time. But it is a new doctrine to us, that a creditor holding collateral securities for a debt, cannot enforce his debt without first surrendering his securities. He is entitled to hold them till he gets his pay; then they belong to the debtor. The cases where a creditor has taken out security in place of another, but has a right to return that and resort to his original demand, have no application to the present case.

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tax for the amount voted on the lists of the inhabitants of the district, and on lands in the district belonging to persons living out of it, and make out a rate bill of the same," and apply to a Justice of the Peace for a warrant to the collector to collect it. This assessing of the tax on the lists, and making out a rate bill, is an official duty which belongs alone to the prudential committee. They are to make out and certify the rate bill as such committee. The removing committee, as they are called, had no such authority; nor could the district confer on them any such authority. It is an authority created by law. The certificate which they signed of the correctness of the rate bill, was of no more legal authority than if made and signed by any other officer or inhabitant of the district.

It is obviously the policy of the law that a known officer, elected for that purpose at an annual meeting, shall superintend this duty—that it may be done with accuracy and integrity.

The rate bill made by the special committee for the removal of the school house had no legal validity, and could not therefore justify the officer in proceeding in its collection.

It is urged that the 7th section of the 81st chapter of Comp. Stat. (p. 463) gives authority to this committee for removal to make out the tax bill. But this is clearly an erroneous construction of the statute. Its words are "When any town, school district, &c., shall impose a tax as authorized by law, it shall be the duty of the selectmen, trustees, or committee appointed for that purpose, to make out a tax bill of such tax," &c. "Appointed for that purpose," means appointed for the purpose of making out the tax bill; and when the law specifies who the officer or committee is, that is to perform that office, it is not left to the town or district to supersede the law by their own action. The appointment of the officer is by law; of the person to fill the office by election in the district in the mode prescribed by law. In this case the prudential committee is "appointed for that purpose" by law.

It appears in this case that the prudential committee did not sign the certificate of the rate bill, or give his assent thereto. Without such official certificate by the prudential committee the tax bill was invalid. Judgment affirmed.

Thrall v. Todd and Trustees.

CHAUNCEY T. THRALL v. ORIN TODD, AND THACHER AND
HENSHAW, *Trustees.*

Evidence. Lost Instruments.

To entitle a party to give secondary evidence of the contents of a written instrument, on the ground that the instrument itself is lost, it must be shown that all the sources of information and means of discovery in the search for it, which the nature of the case would naturally suggest, and which were accessible to the party, had been in good faith reasonably exhausted.

Therefore, where the trustees of the defendant sought to be discharged from liability to the plaintiff, on the ground that the debt due from them to the defendant had been by the latter, before the service of the trustee process, assigned to a third party, who had notified them of such assignment by delivering to their agent and treasurer the written order or assignment directing payment to such third party; and the agent and treasurer in his disclosure testified that he had not the written order with him and did not know where it was; that he might have it among his papers and might have given it to the attorneys of the trustees; which was all the evidence presented as to its loss; *Held*, that this was not sufficient to let in secondary evidence of its contents, as it did not indicate any search for the order among the papers of the treasurer, or inquiry for it of the attorneys of the trustees.

TRUSTEE PROCESS. The case was referred to a commissioner who reported as follows; that the defendant, Todd, was a laborer in the employment of the trustees, Thacher and Henshaw; and at the time of service of the process in this cause, (11th of August, 1857,) the trustees were indebted, on account of the services of the defendant, in the sum of forty-one dollars and eighteen cents; that previous to the service of the process the defendant gave to Melzer Edson an assignment or order to receive the monthly pay from Thacher and Henshaw, and that by virtue of such order or assignment, the trustees had paid to Edson the amounts earned by the defendant, for the months of April, May and June. The order or assignment was not produced before the commissioner, and it was shown that the same had been mislaid or lost. The plaintiff called for the production of the assignment or order, and objected to the introduction of parol proof of its contents, but, upon the testimony of Edson and Gibbons, that the same was mislaid or lost, the commissioner admitted parol evidence of its contents. The order or assignment was never presented to the trustees, nor to either of them, but was presented to

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Mr. Gibbons, the treasurer of the trustees. The money paid Edson was paid by the treasurer, Gibbons; and was applied towards house rent of the defendant and for articles of necessities in the defendant's family, and by endorsement upon a note of the defendant to Edson. The assignment was made to secure Edson's claim against the defendant of something over twenty dollars, and it was also agreed that the money was to be applied in part to pay a claim of about thirty dollars in favor of Pierce & Stearns against the defendant.

Of the testimony returned by the commissioner with his report to the court, that portion which relates to the loss of the order or assignment in question was as follows:

George B. Gibbons, the treasurer of the trustees, testified in his disclosure, that the balance due the defendant was assigned to Edson previous to the service of the writ upon the trustees; that he thought Edson gave him the notice of the assignment, as that was the usual course; that he had a written notice of the assignment; that he had not the written notice with him, and did not know where it was; he might have it among his papers, and might have given it to the attorneys of the trustees; his impression was that Edson left the notice with him, and his reason for thinking so, was that such was the usual course; that Thacher and Henshaw had no personal notice of the assignment.

Melzer Edson testified that the assignment from the defendant to him was in writing, and that he left it with Mr. Gibbons, treasurer of the trustees; that it was drawn by the defendant and presented to Gibbons before the service of the process in this case, and was an order to receive the pay from month to month.

The county court at the September Term, 1860,—PIERPONT, J., presiding,—decided that the trustees were not liable upon the facts and evidence reported by the commissioner, and rendered judgment for the trustees to recover their costs, to which the plaintiff excepted.

It was admitted upon the argument in the supreme court, that the plaintiff excepted in the county court to the finding of the commissioner, on the testimony, that the assignment or order was lost or mislaid, and that the exception was overruled; and it was agreed that the case should be heard as if the plaintiff's excep-

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tions stated that fact, and his exceptions to the county court referred to and embraced that decision.

R. R. Thrall, for the plaintiff.

Linsley & Prout, for the trustees.

KELLOGG, J. The disclosure of the trustees in this case states that they were indebted on account of the labor of the principal defendant, while in their employment, but they claimed that they were not chargeable, as his trustees, because he had assigned to Melzer Edson the amount due from them for his labor, and that Edson had given them notice of the assignment; and the testimony on their part showed, that the assignment was in writing, and had, previous to the service of the trustee process, been left with their treasurer, Mr. Gibbons, who testified that he did not know where it was; that he might have it among his papers, and might have given it to the attorneys of the trustees. The report of the commissioner states that this order or assignment, executed by the principal defendant in favor of Edson, was not produced before him, and that the plaintiff called for its production, and objected to the introduction of parol proof of its contents; but that the commissioner decided, on the testimony of Mr. Gibbons, that it was shown that the paper had been mislaid or lost, and admitted parol proof of its contents. On the argument of the case in this court, it was admitted that, on the hearing in the county court on the commissioner's report, the plaintiff excepted to this decision of the commissioner, and that the exception was overruled, and that the case should now be considered as if the plaintiff's exceptions stated that fact, and referred and were applicable to that decision. This presents the question whether there was sufficient proof of the loss of the order or assignment to justify the decision of the commissioner allowing its contents to be proved by parol. From the commissioner's report and the testimony annexed to the same, to which reference is made by him, it appears that no proof was offered to show that a search had been made for this order or assignment either among the papers of the treasurer or of the attorneys. From the character of the

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disclosure made on the part of the trustees, its contents became material, and it is referred to in the testimony of Edson, who was a witness for the trustees, as the evidence of the assignment from the principal defendant to him of the debt due from the trustees. In respect to the degree of diligence necessary in a search for a lost instrument as preliminary to the admission of secondary evidence of its contents, a party is expected to show that he has in good faith reasonably exhausted all the sources of information and means of discovery which the nature of the case would naturally suggest, and which were accessible to him. We do not think that there was any satisfactory proof of the loss of this paper. For aught that appears, it might have been readily found on a search or inquiry for it in the direction indicated by the testimony of the treasurer. Before parol evidence of its contents was admitted, it should have been shown that a search for it had been made, in good faith and with proper diligence, in the place where it was likely to be found, and that such search proved ineffectual. 1 Greenl. Ev., sec. 558; *Niles & Atkins v. Moulton*, 11 Vt. 470; S. C., 13 Vt. 515; *Town of Royalton v. Royalton and Woodstock Turnpike Co.*, 14 Vt. 311; *Fletcher et al. v. Jackson et al.*, 23 Vt. 581. We think, therefore, that the plaintiff's exceptions to the sufficiency of the proof of the loss of the paper in question, and to the admission of secondary evidence of its contents before a reasonable presumption of its loss was established, were well taken, and that the plaintiff is entitled to have the case re-committed to the commissioner for a new hearing. This conclusion renders it unnecessary to consider the other points made on the argument.

The judgment of the county court in favor of the trustees is reversed,—the report of the commissioner is set aside,—and the cause is remanded to the county court for further proceedings.

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ISAAC MCDANIELS v. LEANDER MORTON AND TRUSTEES
THACHER AND HENSHAW.*Trustee Process. Commencement of suit.*

At the time of the service of the trustee process, the trustees were indebted to the principal debtor in a sum less than ten dollars. Afterwards and prior to the disclosure of the trustees, the principal debtor performed services for them to an amount much exceeding ten dollars; but the trustees disclosed that it had been their custom to pay him as often as he earned ten dollars, and it did not appear from the report of the commissioner to whom the case was referred, that the amount due from the trustees ever exceeded ten dollars at any one time; *Held*, that under the law as it existed prior to the passage of act No. 16, of 1856, the latter fact should appear affirmatively upon the report to entitle the plaintiff to a reversal of the judgment of the court below discharging the trustees.

The commissioner was unable to determine whether the writ issued before or after the enactment of No. 16, of the laws of 1856 (which exempts the personal earnings of debtors accruing to them after the service of the trustee process.) The writ was dated before the passage of the act, but was not served till about three months after its passage; *Held*, that the time when the writ was actually issued must determine when the suit was brought; that its date was *prima facie* evidence of the time of its issue; but that in this case the length of time (four months) which elapsed between its date and service, and the fact that the plaintiff's attorney who made it was unable to say that it was made at its date, and said that it was not then put into the officer's hands, tended to show that it was not issued at its date; that it did not therefore affirmatively appear that the suit was brought before the passage of the act in question, or, consequently, that there was error in the judgment below discharging the trustees on account of such personal earnings of the principal debtor.

TRUSTEE PROCESS. The case was referred to a commissioner who reported the following facts:

At the time of the service of the process upon the agent of the trustees, there was due from the trustees to the defendant the sum of eight dollars and five cents. If the labor performed on the same day of the service of the process is reckoned, then the trustees were indebted to the defendant in the sum of nine dollars and twenty cents. The trustees were the trustees of the second mortgage bonds of the Rutland and Burlington Railroad Company, and the principal debtor was a laborer in their employ. After the service of the process in this cause and previous to the hearing before the commissioner, the defendant had labored for

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the trustees, and the trustees had paid him for his services as follows : in March twenty-five days ; in April twenty-four days ; in May seven days ; in June twenty-six days ; in July twenty-six days ; in August seventeen days ; in September sixteen days ; in October eighteen days ; in November twenty-five days ; all at the rate of thirty dollars per month. The commissioner further found that the plaintiff's writ in this cause was dated the 27th of October, 1856. It was served on the 26th of February, 1857, but the precise day on which the same was actually issued was not shown, nor was the commissioner able to determine. All the indebtedness of the trustees to the defendant was for personal services rendered after the first of February, 1857, and (with the exception of seven or eight days services) after the service of the plaintiff's writ.

George B. Gibbons, the agent of the trustees, testified in his disclosure before the commissioner, that it had been customary, in paying the defendant, for the clerk of the repair shop to give him an order upon him (Gibbons) as treasurer, whenever the defendant earned ten dollars, and that these orders were paid.

The attorney for the plaintiff testified that he had no very distinct recollection of the time the writ in this case was made, and could not say whether it was or was not made at the time of its date ; it was not put into the hands of the officer at the time of its date.

The court, at the September term, 1860, PIERPOINT, J., presiding, decided that upon the facts and testimony reported by the commissioner, the trustees were not liable, and rendered judgment for the trustees to recover their costs. To this decision the plaintiff excepted.

R. R. Thrall, for the plaintiff.

Linsley & Prout, for the trustees.

ALDIS, J. We think the decision of the county court in discharging the trustees, may well be sustained upon two grounds.

I. At the time the writ was served upon the trustees, they were indebted to the defendant only to the amount of nine dollars

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and twenty cents. The trustee discloses that it was his custom to pay the defendant whenever he had earned ten dollars. It does not appear upon the report that the amount due from the trustee ever exceeded ten dollars at one time. This fact should appear affirmatively upon the report. We are not at liberty to pronounce the judgment of the court below erroneous, when it may have been founded upon the fact that the trustee was never in debt to the defendant to the amount required by statute to make him liable.

It is urged that the earnings of the defendant after the service of the writ would increase the nine dollars and twenty cents then due to a sum much beyond the requisite amount. Unquestionably, if they had not been paid to the defendant as often as they came to ten dollars; but they were so paid. In *Carr v. Fairbanks & Co. Trustees of Brusah*, 28 Vt. 806, it was decided that a trustee not indebted in the sum of ten dollars when the writ was served, might lawfully pay the principal debtor for his earnings thereafter and not be liable, provided at no time he became indebted to an amount exceeding ten dollars, though the mutual dealings afterwards would have increased the debt beyond the ten dollars, if there had been no payments. This decision was prior to the law of 1856, and would decide this case without reference to that statute.

II. The act of November, 1856, exempts the personal earnings of debtors accruing to them after the service of the trustee writ. It is claimed that this suit was brought before the passage of the act, and is therefore not subject to its provisions, as the act applies only to suits "thereafter brought."

The writ was dated October 27, 1856, (prior to the act;) it was served February 26, 1857, (after the act;) the commissioner is unable to determine when it issued, whether before or after the enactment of the statutes. The time the writ was actually issued must determine when the suit was brought. Its date is *prima facie* evidence to show when it was issued. But in this case the length of time that elapsed between its date and service (four months,) and the fact that the attorney who made it (Mr. Thrall,) is unable to say that it was made at its date, but says that it was not then put into the hands of the officer,

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tend to show that it was not issued at its date. With these conflicting facts, and with the fact reported by the commissioner, that he cannot determine when it was issued, it does not affirmatively appear that the suit was brought before the 14th of November, A. D. 1856, the time the act was passed; and without this it does not appear that there is error in the judgment of the court below. All presumptions are to be made in favor of the judgment. We never presume error—or facts necessary to establish error. On this ground, therefore, we feel required to affirm the judgment.

Judgment affirmed.

SAMUEL JORDON AND WIFE v. BENJAMIN N. DYER.*Contract. Sale Assumpsit.*

The plaintiffs agreed to sell their farm to the defendant for twelve hundred dollars, and to take for it the farm of one G.—which they examined before the bargain was completed—at the same price, provided G. would not take a less price for his farm. The defendant agreed with G. for his farm at a less price, but represented to the plaintiffs that G. would not take less than twelve hundred dollars, and the trade with the plaintiffs was thereupon completed, the plaintiffs declaring at the time that they were not “swapping” farms but buying and selling. It appeared that the plaintiffs were deceived by the defendants as to the amount paid by the latter to G. for his farm, and would not otherwise have traded without the payment to them of the difference between the twelve hundred dollars and the sum for which the defendant bought the G. farm. There was, however, no agreement or promise to pay to the plaintiffs anything more than the G. farm for theirs: *Held*, that the transaction was not an exchange of farms without reference to price, but a sale by the plaintiffs to the defendant, with the understanding that they were to take in payment the G. farm only at the price for which it was bought of G.; and that the plaintiffs were therefore entitled to recover in assumpsit against the defendant the difference between the twelve hundred dollars and the amount paid for the G. farm by the defendant.

Whatever is expected by one party to a contract, and known to be so expected by the other, is to be deemed a part or condition of the contract.

ASSUMPSIT for a portion of the price of certain real estate sold by the plaintiffs to the defendant.

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The case was referred and the referee reported the following facts: In the spring of 1856 the defendant was desirous of purchasing the farm of the plaintiff, Mrs. Jordon. She and her husband were willing to sell the same for twelve hundred dollars, and for no less sum, but would not sell unless they could first find where they could procure another farm that would suit them. Alanson Dyer, the father of the defendant, in his behalf, participated in the negotiation for the bargain. The defendant informed the plaintiffs that Rufus Goss, of Brandon, had a farm that he thought would suit the plaintiffs, and that Goss' price for the farm was twelve hundred dollars. The plaintiffs agreed to go and see Goss' farm, and Mr. Jordon went to Brandon for that purpose. The defendant or his father went with him and informed Jordon on the way that he could make a more advantageous trade with Goss for the plaintiffs, than he, Jordon, could, and requested him to leave that part to him, Dyer. After viewing the Goss farm and consultation with each other, the plaintiffs agreed to sell their farm to the defendant at twelve hundred dollars, and take the Goss farm at the same sum, if the defendant could not induce Goss to take less for his place. The defendant traded with Goss and bought his farm for ten hundred and fifty dollars, and took a deed to Mrs. Jordon, to be returned to Goss if the trade should not be consummated with her and her husband. The defendant went to the plaintiffs with the Goss deed, and proposed to complete the trade. Mrs. Jordon, who was principal speaker in the negotiations, said she was willing to take the Goss place at twelve hundred dollars, if that was his lowest price, and asked the defendant if he could not beat down Goss any in the price. The defendant then assured her that he could not; that twelve hundred dollars was the least Goss would take. The parties then went to the town clerk's office, and there executed the deed from the plaintiffs to the defendant, and the deed from Goss was delivered by the defendant to the plaintiffs, Mrs. Jordon declaring at the time that she was not swapping farms, but buying and selling. The referee found that the plaintiffs were deceived by the defendant, and that if it had not been for the false representations of the defendant relative to the amount paid Goss for his farm, the plaintiffs would not have

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traded without the payment of one hundred and fifty dollars more. There was no agreement or promise to pay the plaintiffs anything more than Goss' land for the plaintiffs' farm.

It was agreed by the parties that if the court should be of opinion that the plaintiffs were entitled to recover, upon the foregoing facts, the judgment in their favor should be for one hundred and ninety dollars and their costs; otherwise, that the defendant should recover his costs.

The county court, at the September term, 1860, — PIERPOINT, J., presiding,—rendered judgment, upon the foregoing report, for the plaintiffs, to which the defendant excepted.

Briggs & Nicholson, for the defendant.

Linsley & Prout, for the plaintiffs.

KELLOGG, J. This is an action of assumpsit for the recovery of the price of certain real estate alleged to have been sold by the plaintiffs to the defendant, and the facts relied on to support the action appear in the report of the referee to whom the cause was referred in the county court. The plaintiff's claim depends on the question whether the real character of the transaction between them and the defendant was that of a *sale* of the farm of Mrs. Jordon, one of the plaintiffs, to him for a certain and specified price, or that of an *exchange* of this farm with him for the Goss farm, without reference to any agreed price either for the one or the other, like the case of the exchange of articles of property when treated by the agreement of the parties as being equal in value.

We regard it as a rule of law, no less than of morals, that whatever is expected by one party to a contract, and known to be so expected by the other, is to be deemed a part or condition of the contract. Applying this rule to the facts reported by the referee, we think that this transaction should be regarded not as an exchange of farms, but as a sale by the plaintiffs of their farm to the defendant, and that the defendant, by his conduct and representations, intentionally led the plaintiffs to act on the basis of his acceptance of their proposal to sell their farm to him for the

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specified price of twelve hundred dollars, and to take the Goss farm in payment at the same sum *if the defendant could not induce Goss to take a less sum* for his farm. The proposal implied that if the defendant bought the farm of Goss for a less sum, the plaintiffs were to take it in payment for their farm only at the price for which the defendant might purchase it of Goss. The defendant having purchased the farm of Goss for one hundred and fifty dollars less than the price for which he knew the plaintiffs were selling their farm to him, and having obtained a conveyance from the plaintiffs, not merely by concealing that fact from them when it was his duty to disclose the truth in regard to it, but also by falsely representing to them that he paid to Goss the same sum for which they had proposed to sell their farm to him, should, on the facts reported by the referee, be treated as having to that extent "kept back a part of the price" of the plaintiffs' farm; and the plaintiffs are entitled to recover it in this action.

The judgment of the county court in favor of the plaintiffs on the report of the referee is affirmed.

JOHN FULLER v. JOHN D. BUSWELL.*Contract. Assumpsit.*

The defendant executed to the plaintiff a written contract, wherein, after reciting that the plaintiff had let the defendant take two oxen to work and use well, and run all risk to them of accident, sickness and death, for one year, and that the plaintiff had received of the defendant an obligation against one B., for the sum of \$62.66, to be applied on the contract when paid, it was provided in substance that if the defendant had a mind to pay the plaintiff \$115, and interest, in one year, he might own the oxen, but if they were returned he was to pay \$12 for the use of them; and that if the defendant paid the plaintiff or bearer \$62.66, and interest, the plaintiff should give up to the defendant the obligation of that amount above mentioned. It appeared that under this contract the defendant kept the oxen until a short time before the close of the specified year, when he told the

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plaintiff he was not going to return them, and kept and used them until one of them died, shortly after the close of the year; and that the defendant had not paid anything for the oxen or for the use of them; *Held*, that the contract showed that the parties really contemplated a sale of the oxen but took pains to keep the title to them in the plaintiff to secure him until they were paid for; that the facts proven showed an election on the defendant's part to become the purchaser of the oxen under the contract; that the fact of the plaintiff's bringing suit for the price of the oxen showed an election on his part to treat the defendant as their owner; and that the plaintiff was entitled to recover their price under the common counts in *assumpsit*.

Held, also, that the fair meaning of the contract was, that if the oxen died in the defendant's hands, so that he could not return them, he was to be liable for their price, as upon an absolute purchase.

ASSUMPSIT for the price of two oxen. Declaration on the common counts; plea, the general issue, and trial by the court at the March term, 1860, PIERPOINT, J., presiding.

The plaintiff gave in evidence a written contract, executed by the defendant, of which the following is a copy:

"MOUNT HOLLY, April 21, 1858.

"This will certify that John Fuller has let John D. Buswell take two oxen, five years red oxen, that I bought of Parker Shattuck, to work and use well and run all the risk of accident, sickness and death, for one year, for one hundred and fifteen dollars and interest. If said Buswell returns said oxen he is to pay said John Fuller or bearer twelve dollars for the use of them. This day received an obligation of said Buswell of sixty-two dollars and sixty-six cents, against Frederick B——, dated April 5th to answer on this obligation when paid. If said John Buswell is a mind to pay John Fuller or bearer one hundred and fifteen dollars and interest, in one year, he may own said oxen. If they are returned he is to pay twelve dollars for the use of them. If said oxen are not used well, or there is danger of losing them, they are to be returned on demand, and the rent in proportion to the time he keeps them. If said Buswell pays John Fuller or bearer sixty-two dollars and sixty-six cents and interest, said John Fuller is to give up to said Buswell the above obligation of that amount."

The plaintiff also gave evidence to show that the defendant took the oxen named in the written contract, of the plaintiff, at

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the date of and under the contract, and kept them until a short time before the end of the year specified therein, when he told the plaintiff that he was not going to return the oxen as provided in the contract, and kept them and used them, till one of the oxen died in May, 1859, after the specified year had expired, and before the bringing of this suit, and has not paid the plaintiff anything for the oxen or for the use of them.

Upon this evidence, and under the contract, the court decided that the plaintiff could not recover in this action. To this decision the plaintiff excepted.

F. C. Robbins and W. H. Smith, for the plaintiff.

Sewall Fullam, for the defendant.

POLAND, CH. J. By the terms of the written contract between the plaintiff and defendant, the latter had an election to return the oxen at the end of the year, and pay twelve dollars for their use, or to keep the oxen as his own property by paying the sum of one hundred and fifteen dollars. It is evident enough that the parties contemplated, really, a sale of the oxen by the plaintiff to the defendant, but took great pains to make sure the title to the oxen in the plaintiff, to keep him secure until he received his pay.

The fact that the risk of all accidents to, or the sickness or death of the oxen during the year, is thrown upon the defendant, proves this, and the fact that no provision is made in the contract that the plaintiff is to return the obligation of F. B., taken toward the oxen, or the money received upon it, in case the defendant returns the oxen, also tends in the same direction. It is probable that that portion of the contract, making it a lease of the oxen for a year at defendant's election, was inserted more because they supposed it necessary to keep up the plaintiff's title than from any expectation that the defendant would in any event desire to return them. Near the end of the year the defendant informed the plaintiff that he should not return the oxen, and he continued to keep and use them after the year had expired, and till one of them died. This must be regarded as an election by

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the defendant to become the purchaser of the oxen, under that term of the contract. It would be altogether unreasonable to suppose that he thereby intended to wrongfully hold the oxen and refuse to pay the price. If the price was not paid the plaintiff might refuse to let him keep the oxen, but if he chose we think he might assent to his keeping them, and treat him as his debtor for the price, or so much as was unpaid, and maintain an action therefor.

It is not found in the case that the plaintiff assented to the defendant's becoming the owner of the oxen, and the defendant says the plaintiff cannot maintain his action of general assumpsit as for a sale of the oxen, till such assent be shown; that until then the oxen continued to be the property of the plaintiff; that if defendant failed to pay, or return the cattle, at the end of the year, the plaintiff's remedy must be an action on the written contract, or trover for the oxen. But the fact of bringing the suit for the price is of itself an assent and election by the plaintiff to treat the defendant as his debtor, and an affirmation of the sale to the defendant. The fair meaning of the contract is, too, that if the oxen died in the defendant's hands, so that he could not return them, he was to be liable for the price, as upon an absolute purchase. Upon the facts found by the county court, we think the judgment should have been for the plaintiff; and the judgment is therefore reversed, and judgment rendered for the plaintiff.

DANIEL LINCOLN, by HENRY NICHOLS *Guardian*, v. REUBEN R. THRALL.

Pleading. Abatement.

In an action in favor of a person of unsound mind, brought by his guardian, the defendant pleaded in abatement the pendency of a prior suit between the same parties for the same cause of action. The plaintiff replied, that when the first suit was commenced, the plaintiff was under guardianship, and that

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the guardian did not sue out the writ in that suit, and was not a party thereto, or in any way named in it; *Held*, that the plea in abatement, as it did not deny the guardianship, was insufficient to abate the second suit in that it did not allege either that the first action was commenced before the plaintiff was placed under guardianship, or, if after, that it was commenced by the procurement or assent of the guardian.

Held, also, that it was too late to insert these necessary allegations in the defendant's rejoinder to the plaintiff's replication, as a plea in abatement cannot be aided by matters alleged in subsequent pleadings.

The declaration in the second suit counted upon a judgment for the sum of five hundred and seventy-three dollars and forty-seven cents damages. The plea alleged that the declaration in the first suit counted upon a judgment for five hundred and twenty-three dollars and forty-seven cents; *Held*, that although it was unnecessary to describe the judgments in the plea, yet having done so, the general allegation contained in the plea, that the two suits were for the same cause of action, which would otherwise have been alone sufficient, would not aid the plea when it appeared by comparison of it with the declaration, that the judgments were for different amounts.

DEBT. The plaintiff declared upon two judgments recovered against the defendant in the county court of Rutland county, one, in 1854, for one hundred and thirty dollars and twenty-five cents damages, and one hundred and eighty dollars and forty-four cents costs, the other, in 1856, for five hundred and seventy-three dollars and forty-seven cents damages, and one hundred and forty-two dollars and one cent costs.

The defendant pleaded in abatement the pendency of another suit in the Rutland county court, commenced on the 15th of January 1858, in favor of the plaintiff and against the defendant in this suit, in which the plaintiff then declared in a plea of debt, upon a judgment recovered by the said Daniel Lincoln, against this defendant, in the Rutland county court, holden on the second Tuesday of September, 1854, for the sum of one hundred and thirty dollars and twenty-five cents, damages, and the further sum of one hundred and eighty dollars and forty-four cents, costs of suit; also in a plea of debt on judgment, for that the plaintiff in the Rutland county court, on the second Tuesday of September, 1856, recovered a judgment against the defendant for the sum of five hundred and twenty-three dollars and forty-seven cents, damages, and the sum of one hundred and forty-two

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dollars and one cent for his costs; and the defendant averred that the said declaration is upon the same identical judgments as those declared upon in the declaration in the present suit; that the parties in this and the former suit are the same; and that the former suit, so brought and prosecuted against him, the defendant, by the said Daniel Lincoln, was still pending, at the time the plaintiff prayed out his writ, in this his second suit, upon the same identical judgments as before described.

The plaintiff set forth, in reply, the appointment on the 16th day of March, 1855, by the probate court of the District of Rutland, of Henry Nichols as guardian of Daniel Lincoln, the latter having been adjudged *non compos* by that court, together with the proceedings thereto, and averred that Nichols did not sue out the writ in favor of Lincoln against the defendant, so prayed out on the 15th of January 1858, as alleged in the defendant's plea, nor was he a party to the same or in any way named in the writ.

The defendant alleged by way of rejoinder, that Edgerton & Hodges were the attorneys for Daniel Lincoln in the prosecution of the claim, long before the appointment of Henry Nichols as guardian, and continued in the prosecution of the claims as attorneys for Lincoln, under Nichols as his guardian; and the commencement and prosecution of the first suit, above mentioned, was in pursuance of their original engagement by Lincoln, and the continuance and further prosecution of the same was by the consent and under the continued engagement of Nichols, as guardian of Lincoln; that no objections were ever raised to the prosecution of said suit on account of the non-joinder of Nichols as guardian; that Lincoln never, after the appointment of Nichols, attempted to control Edgerton & Hodges in their prosecution of the suit, or in any way to interfere in the same; and that Nichols might, by leave of court, have entered in the first suit, and have prosecuted and controlled the same; or, if he had any fear that Lincoln would have attempted or wished to prosecute or control the same, he might, as his guardian, have taken charge of the same, and might have given notice to this defendant of the discontinuance of the first suit before he commenced his second suit, or might, by leave of court, have entered his own name as

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guardian, and have prosecuted the first suit as guardian for Lincoln.

The plaintiff demurred to the defendant's rejoinder.

The court at the March term, 1860, PIERPOINT, J., presiding, decided that the rejoinder was insufficient, and the defendant excepted.

The defendant *pro se*.

S. H. Hodges, for the plaintiff.

POLAND, CH. J. The case of *Holden v. Scanlin*, 30 Vt. 179, decided that suits in behalf of insane persons under guardianship must be brought by the guardian in behalf of the ward. To this suit brought by the guardian, the defendant pleaded in abatement the commencement and pendency of a previous suit by the ward. If the ward, while under guardianship, without the authority or assent of the guardian procures a suit to be instituted, the guardian is not bound by it, nor is he thereby precluded from bringing an action to enforce the same claim or right, which the ward has thus improperly attempted.

The plea ought therefore to allege that the first action was commenced before the plaintiff was placed under guardianship, or that the first suit was commenced by the procurement or assent of the guardian, in order to show a sufficient ground for abating the second, as it does not deny the guardianship. The plea fails to do this, and therefore shows no sufficient ground of abatement.

The defendant's rejoinder to the plaintiff's replication, setting up the proceedings by which the guardian was appointed, attempts to answer it by showing that the first suit was commenced with the assent of the guardian, or by attorneys employed by him, but this rejoinder is so inartificial that it is not attempted to be supported in argument as good pleading. It is in form both a demurrer to the replication and a rejoinder of new matter, and is both double and argumentative.

If the new matter was properly alleged, it is too late, for the same matter should have been contained in the plea to make that

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good, and a plea in abatement cannot be helped by matters alleged in subsequent pleadings.

The plea is also defective in misdescribing the cause of action. The plaintiff's declaration counts upon two judgments; one is described as being for the sum of five hundred seventy-three dollars and forty-seven cents damages. The plea says that the declaration in the former suit counted upon two judgments, and describes them—one as being for the sum of five hundred twenty-three dollars and forty-seven cents damages. The plea alleges that the former suit was brought upon the same identical judgments as the present suit, and the same described in the plea. It was unnecessary for the defendant to have described the judgments in his plea; the allegation that both suits were for the same cause of action would have been sufficient. But having set out and described the judgments upon which the first suit was brought, in the plea, and one of them appearing to be for a different sum from the judgment declared upon in this suit, the general allegation that they are the same and identical, will not help out the plea when they show by comparison they are not the same.

It often happens that a party becomes bound to give proof and subject to objections of variance, by alleging particulars in his declaration or other pleadings, which he might safely have omitted altogether. The old and leading case of *Bristow v. Wright*, Doug. 665, furnishes an illustration of that danger. Pleas in abatement ought at least to be equally subject to such disaster, with more meritorious pleading. These views of the plea relieve us from examining the technical objections made to the mere form of the plea.

Judgment affirmed.

Robinson et al. v. Hurlburt et al.

ROBINSON & CHURCH v. HURLBURT & MILLER.

Payment. Promissory Note. Agreement.

The plaintiffs had an account against the defendants, H. & M., as partners; also an unsettled account against H. individually and another against the firm of H. & Bro. C., one of the plaintiffs, settled all these accounts by receiving H's individual promissory notes for their amount. At the time of the settlement, M., one of the defendants, objected to the settlement of H. & M's account in that way, saying that H. & M. preferred to pay their own debts; but C. replied that he preferred to do so, as he knew H., and was not afraid to trust him. On giving the note, H. charged the firm of H. & M. with the amount of their account included in the note, and the plaintiffs credited the note received, and balanced the accounts so settled. Some time afterwards M. requested the plaintiffs to send him a statement of their account against the then late firm of H. & M., which he received, consisting only of items which had accrued subsequently to the time the note of H. was given. The court, assuming that the case was to be governed by the laws of the State of New York, where the accounts were made, under which the fact of taking the note either of the debtor or of a third person for a pre-existing debt, does not discharge the debt without an express agreement to that effect between the parties, *held*, that the facts showed such an express agreement of the parties that the note was to be received by the plaintiffs in payment of the defendants' account, as rendered it operative as such payment even under the laws of that state.

The language "express agreement," in the cases upon this point, does not mean an agreement in any particular express terms or form of words, but is used to denote the result of a mutual understanding and meeting of the minds of the parties, in contra-distinction to an agreement implied by law.

BOOK ACCOUNT. The auditor reported the following facts:

The plaintiffs exhibited an account marked "A" for one hundred thirty-seven dollars and ninety cents.

The defendants were partners from January, 1857, to the last of March of the same year, when their partnership was dissolved. The plaintiffs had an unsettled account with the firm of Hurlburt & Brother, of which Daniel Hurlburt, one of the defendants, was a member, and against Daniel Hurlburt alone; and the account presented by the plaintiffs marked "A," though charged on the journal to Hurlburt & Miller, by whom the goods were ordered, had been improperly posted to the account of Daniel Hurlburt. On the 17th of March, 1857, C. H. Church, one of the plaintiffs came to Fairhaven, and settled all these accounts, except the four latest items, which constituted an account marked

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"B," by receiving Daniel Hurlburt's note dated March 5th, 1857, for two hundred eighty dollars and nine cents, payable four months from date at the bank of Rutland, which note has not been paid. At the time of settling said accounts, Miller, one of the defendants, objected to the settlement of Hurlburt & Miller's account in that way, preferring it should be kept separate. Church insisted upon its being included in Daniel Hurlburt's note, for the reason that it stood upon the ledger to his account and he was acquainted with him. It appeared that Church knew before he came to Fairhaven that the account had been wrongly posted on the ledger, and that at the settlement the parties had the separate accounts before them. The plaintiffs credited the note received and balanced all the accounts so settled, and Daniel Hurlburt charged Hurlburt & Miller with the amount of their account included in the note. On the 11th of June, 1857, Miller, one of the defendants, requested the plaintiffs to send him a statement of their account against the then late firm of Hurlburt & Miller, and on the 13th day of the same month he received the account marked "B," amounting to forty-six dollars and nine cents, which was in the handwriting of the plaintiffs' book-keeper, and had accrued since the above settlement.

The auditor further reported that all the goods charged in the plaintiffs' account were sold and delivered by the plaintiffs to the defendants at Troy in the State of New York.

The case was tried in the county court on the foregoing report and carried to the supreme court, where, at the January term, 1860, it was remanded and recommitted to the auditor, who made an additional report that the account of forty-six dollars and nine cents marked "B," was not due at the time of the commencement of this suit; and further reported in addition to what he had before reported, respecting the giving of the note by Daniel Hurlburt to the plaintiffs for that portion of their account embraced in paper marked "A," that there was no special agreement between the plaintiffs or either of them, and Hurlburt or Hurlburt & Miller, that Hurlburt's note should be received or accepted in payment of that account, and that nothing was said on the subject between the parties, except that Church, one of the plaintiffs, when he was at Fairhaven, as stated in the

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former report of the auditor, said in conversation with the defendants, that he had rather have that account included in the note; that Miller, one of the defendants, objected to it, saying Hurlburt & Miller preferred to pay their own debts. Church replied that he preferred to do so as he knew him (Hurlburt) and was not afraid to trust him. From the facts heretofore reported, as well as from the additional facts herein stated, the auditor did not find that the plaintiffs or that Church did expressly agree to accept the note in payment of the account; but if the court, upon the facts reported, as matter of law, should think otherwise, then he found that the note was accepted in payment of the account, and found in that event that there was nothing due from the defendants to the plaintiffs to balance book accounts.

The auditor further reported that the plaintiffs produced, on the trial before him the original note of Hurlburt, referred to in his former report, which he returned with his report to the court.

Upon the foregoing report the county Court, at the September term, 1860, PIERPOINT, J., presiding, rendered judgment for the plaintiffs to recover the amount of both bills named in the report; to which the defendants excepted.

H. G. Wood and E. J. Phelps, for the defendants.

Linsley & Prout, for the plaintiffs.

BARRETT, J. In view of the numerous decisions of the courts of the state of New York, the law of which has been often explicitly recognized and asserted by the supreme court of this state, we assume without discussion, that under the law of that state, the taking of a note either of the party or of a third person for or upon a pre-existing debt, does not *prima facie* discharge such debt; that in order for it to have that effect, it must appear affirmatively to have been so taken with an express agreement that it should be in payment, or discharge of such debt. The leading question, therefore, to be considered in this case is, whether the note of Hurlburt, one of the defendant partners, was taken by the plaintiffs in payment or satisfaction of their account

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existing against the defendants at the time said note was taken, conformably to the law of the state of New York.

The auditor has reported all the facts constituting the transaction and its history, of the taking and holding of said note by the plaintiffs, and then says : " From the facts heretofore reported as well as from the additional facts herein stated, I do not find that said plaintiffs or said Church did expressly agree to accept said note in payment of said account ; but if the court upon the facts reported, as matter of law, shall think otherwise, then I find said note was accepted in payment of said accounts," &c. The auditor having thus reported, it is devolved on us to determine the legal effect of the report as made. In the first place, therefore, what is the sense in which he says " I do not find that the plaintiffs or the said Church did *expressly agree* to accept said note in payment of said account." This expression is to be considered in connection with the special facts reported, and in so considering it the only conclusion that we are able to arrive at is, that the auditor means, that he does not find that it was agreed in express terms, that he refers to the form rather than the substance of what transpired between the parties. This is strongly indicated by his saying, that he finds that nothing was said between the parties on the subject, that said note should be received or accepted in payment of said account, except what Church said when at Fairhaven, &c.

We think, therefore, while he means to certify to the court that he does not find in terms a formal agreement between the parties, that the note should be given and accepted in payment of the account, he does not intend to interfere with or conclude the question of whether there was in fact an agreement between the parties to that effect, evidenced by and consisting in the facts which he has specifically reported.

It is then to be enquired what the law of New York requires as to the character of the agreement necessary in order to render it effectual in making the taking of a note operative as a payment of a pre-existing debt.

Now we understand the matter to stand on this ground, as the basis principle, viz: that the mere fact of taking such note does not operate a payment of the pre-existing debt ; nor does

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the law upon that fact predicate such a presumption—but the contrary; just as in this state, the law does not presume that it was taken as a security merely, but that it was taken as payment. If, therefore, an effect contrary to the legal presumption is claimed for a note thus taken, it is incumbent on the party making such claim, to show as matter of fact, that it was agreed between the parties that it should have such effect. When this is done we all understand that the requirement of the law is answered and the agreement is to control and determine the effect which the taking of the note is to have. The language used in some of the cases, “express agreement,”—is obviously used in distinction from an agreement which the law implies—an agreement as matter of fact—the result of the mutual understanding and meeting of minds of the parties,—without regard to the manner in which such a result has been attained, or the form in which it is announced, or the means by which it is to be proved. In New York the law implies upon the naked fact of taking a note upon a pre-existing debt, that it was agreed to be taken merely as security. In this state the law implies that it was agreed to be taken as payment. In many cases where a legal duty is cast upon a person to pay, the law implies an agreement to pay. As distinguished from such agreements, are all those that result from the concurrent meeting of the minds of the parties as matter of fact, by which they mutually understand that a specific arrangement has been made between them, of which their then and subsequent acts constitute the consummation and execution.

Does the report show an agreement in this sense of an express agreement, that said note of Hurlburt should be in payment and satisfaction of said account? Upon this point none of us have any doubt, that the facts reported constituted an actual consummated payment of the account by the note, in pursuance of the mutual understanding and intentions of the parties.

Church, one of the plaintiffs, settled their account with the defendants by receiving said note. Hurlburt charged the defendants, Hurlburt & Miller, with the amount of said account, on the giving of said note. This was on the 17th of March, 1857. On the 11th of June following, Miller, one of the defendants, request-

ed the plaintiffs to send him a statement of their account against the then late firm of Hurlburt & Miller, and on the 13th received their account, consisting only of items that had accrued subsequently to the time of receiving said note by the plaintiffs and settling their account with the defendant as before stated. On the occasion of making said settlement and taking said note, when Church said he had rather have said account included in said note, Miller objected to it, saying Hurlburt & Miller proposed to pay their own debts. Church replied, that he preferred to do so, as he knew Hurlburt and was not afraid to trust him. If these facts do not constitute an appropriation of the note in payment of the account, with the mutual understanding of all parties that such was the case, and with their mutual concurrence that it should be so, it is difficult to imagine a state of facts that would constitute such appropriation in payment. After all this had been done, to permit the plaintiffs to say that the taking of the note is not to operate as a payment of the account, would require us to hold that in contemplation of the law, an express agreement depends upon and can only be made by the use of a form of words—would require that, indeed, we should adopt the idea in which the auditor has obviously used the terms “expressly agreed,” in his report, that whether an express agreement or not, depended upon the form of words used, instead of the substance and meaning of what was said and done by the parties.

We think that no principle of law, or rule of construction or interpretation of language either of the cases cited or of the report itself, would justify us in so doing. On the other hand, the exposition we here make as to the sense in which the language of the cases as to *express agreement* is used, gives efficacy to established principles, and applies that language to this subject in its common legal signification,—and at the same time relieves the matter of the embarrassment in which that expression has seemed to involve the present case.

As we fully concur in this view of the case, we have thought best to consider and dispose of it upon the assumption that it is to be governed by the law as it is settled and administered in the state of New York, without any discussion of the question, which was very much debated a year ago by the members of the court,

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whether, indeed, the transaction of taking the note was to be governed by the law of New York or Vermont. It is, perhaps, proper to say that some members of the court did not then take the view which is adopted in the written opinion of Judge Redfield, and as the case was left upon consultation did not understand that any decision of that question was agreed upon.—but supposed that the case was to be recommitted for a fact to be supplied as to the four last items of the account in question, with the controverted questions of law to stand for reconsideration upon the coming back of the case with the lacking facts supplied.

The result is, that as we hold the plaintiffs not entitled to recover for the part of the account covered by the note of Hurlburt, they cannot recover for the items that were not due when the suit was brought.

The judgment is therefore reversed, and judgment rendered in this court for the defendants to recover their costs.

THEODORE COOK v. CARPENTER & COOK.*Partnership. Pleading. Practice. Reference.*

When two or more persons agree to become partners, and actually proceed to carry into execution the joint undertaking or business, the relation of partners will exist, although the conditions of the partnership are not understood alike by the partners.

Where parties agree to an arbitration or reference of a pending action, under a rule of court that the court shall render a judgment upon the report or award, even when it is a part of the rule of reference, that the arbitrator or referee is to be governed by the rules of law, it is the cause of action which forms the basis of submission, and not the particular form of the declaration, nor any particular issue which may have been formed upon it; and the arbitrator or referee is not bound by the particular declaration and pleadings, but may award upon the subject matter of the suit without regard to them.

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The power of an arbitrator or referee extends to just what the parties have agreed to submit, and no more; and if he undertakes to try and award upon matters not submitted, the award will be invalid.

Therefore, where the declaration was general assumpsit, and the cause of action which formed the basis of submission was money paid for the benefit of the defendants on a certain note which the plaintiff claimed to have signed as surety for the defendants, it was held, that the referees had no power under the submission to enquire about, and report in respect to, partnership dealings between the parties, and the referees having so done, and awarded a balance due to the plaintiff, the court refused to pronounce judgment thereon.

But, whether, in such case, if the submission be extended, by consent of the parties, before the referees, the rule would be different, *quere?*

GENERAL ASSUMPSIT. The declaration contained the common counts. The case was referred under a rule of court by agreement of parties, and was tried by the court on the report of the referees, at the September term, 1861, PIERPOINT, J., presiding.

The referees reported that the plaintiff and the defendant, Hiram Cook, previous to the first of September A. D., 1857, had been engaged as partners for two or three years, in the business of buying cattle and hogs in the town of Huntington and vicinity, for the Boston market,—that about the first of September, A. D. 1857, the plaintiff and Hiram Cook, being still partners in the same business, were taking a drove of cattle and hogs to market over the Vermont Central railroad, and that the defendant Carpenter was on the train with them,—that Hiram Cook proposed to the plaintiff that they should take Carpenter in with them as a partner, representing that he would be a good person to buy stock,—that the plaintiff said to Hiram Cook that he would do so, if he (Hiram Cook,) and Carpenter would provide the money to buy the stock, and would buy and deliver the same at Cambridge market, and that he (the plaintiff,) would sell the stock so purchased and delivered by Hiram Cook and Carpenter, and guarantee the sales; and that the expenses should be borne equally by the three and the profits and loss should be divided equally;—that Hiram Cook went immediately to Carpenter and told him the plaintiff was willing to take him in as a partner; that Hiram Cook and Carpenter were to buy the stock, and take

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it to Cambridge; that the plaintiff would sell it; that the money was to be obtained from some bank on the joint note of the three, and that they were to share equally in the expenses, and in the profits and loss; but he said nothing to Carpenter in relation to the plaintiff's guaranteeing the sales, nor did he mention to him the proposition of the plaintiff that the defendants should furnish the money to be employed in the prosecution of the business,—and, that Carpenter consented to go into the business upon the terms as stated to him by Hiram Cook. Carpenter and the plaintiff had no understanding in relation to the conditions of the partnership agreement, except what resulted from their respective interviews with Hiram Cook as above stated; and the plaintiff supposed that the defendants were to furnish the money, and that he was to guarantee the sales, while Carpenter supposed the money was to be furnished equally by the three partners; and no different or other arrangement, or understanding was made or had between them.

The referees further reported that Carpenter entered at once upon the business of buying cattle and hogs in Huntington and vicinity under said arrangement, while the plaintiff and Hiram Cook proceeded to Boston; that on their return from Boston Hiram Cook said to the plaintiff that he and Carpenter would want the use of his name to obtain money from some bank to employ in the business, and the plaintiff gave Hiram Cook authority to sign his name to a note for that purpose; that soon after Hiram Cook drew a joint note running to the Farmers' & Mechanics' Bank of Burlington, for one thousand six hundred dollars, payable in ten days from date, which was signed by Hiram Cook and Carpenter, and Hiram signed the name of the plaintiff thereto, in pursuance of the authority so given to him; that the note was discounted by said bank, and the money used in the purchase of stock, which was taken to market and sold mainly by the plaintiff; that the money derived from this sale, by the agreement of the plaintiff and defendants, was used to buy more stock, and the note given as aforesaid at the bank in Burlington was renewed. The business of the partners resulted in a loss. The bank note not being paid, suit was commenced thereon against all the signers, and much the largest part due on

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the note was collected out of the property of the plaintiff, or paid by him.

The referees also reported the dealings and accounts of the partners, in detail, and found a balance due to the plaintiff from the defendants thereon; and also reported that the parties did not agree that the accounts of the partnership should be adjusted in this action. By the terms of the reference, the referees were to be governed by the rules of law. The plaintiff filed a specification, which was for money paid on the note above named, and for trouble and expenses in relation to the same. The court rendered judgment on the report for the defendants, to which the plaintiff excepted.

D. E. Nicholson and Linsley & Prout for the plaintiff.

E. J. Phelps, for the defendants.

POLAND, CH. J. The plaintiff, in this action of general assumpsit, claims to recover the amount he was compelled to pay upon the note given to the bank, signed by himself, and the other two defendants, upon the ground that the other defendants were the principals, and he their surety. The defendant Carpenter claims that the plaintiff and defendants were partners, and that this note was given to raise funds to carry on the partnership business; that the signers all stood as principals on the note, and that the matter can be adjusted properly, only by some proceeding proper to settle the whole partnership concern, and that this action is inadequate and inappropriate to that end. The plaintiff insists that there was no partnership, that as there was a total misunderstanding between him and the defendant Carpenter, as to the basis or articles of the partnership, no partnership existed; and many authorities are cited to show that to constitute a partnership there must be an agreement, a meeting of the minds of the parties, and that a man cannot be made a member of a partnership without his consent. The soundness of this principle cannot be doubted; the difficulty is, it does not apply to the case. The plaintiff and the defendant Carpenter, did both agree to be partners, and both understood they were acting as

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partners ; and actually proceeded to carry on the joint enterprise, with the understanding that they were to share in the profits or losses of the transaction ; but, by the default of the defendant Cook, they did not understand the terms of the joint agreement alike. The plaintiff understood that the capital was to be raised wholly by the defendants, while the defendant Carpenter understood it was to be raised in the ordinary way, by all the members of the firm. It has never been held that when persons agree to become partners, and actually proceed to carry into execution the joint undertaking or business, that the relation of partners does not exist, because the conditions of the partnership are not understood alike by the partners. It is conceded that the note to the bank was given to raise the funds to carry on the joint business, but the same differing ideas of the partnership relation still existed, and while the plaintiff supposed that he was signing the note as a surety for the others, the defendant Carpenter supposed all were equally bound as principals. From the facts reported by the referees, neither the plaintiff or Carpenter seemed to have been at all in fault in understanding the terms of their connection as they did ; the whole blame rested on the defendant Cook, who acted as the medium between them in making the arrangement. We see no ground on which the plaintiff can claim that the defendant Carpenter shall be bound by the contract as the plaintiff understood it, with any better reason, than Carpenter can claim that the plaintiff shall be bound by Carpenter's understanding of it. In this dilemma, both parties being without fault, we think the matter must stand for settlement between them upon the general principles of partnership, that the gains or losses be shared by the respective partners.

In this case it seems that, so far as the plaintiff and Carpenter are concerned, there has been a loss, and the referees have reported the amount of their respective losses.

The plaintiff admits that his action is not the proper one in which to adjust the partnership dealings, but he claims that as the action was referred by agreement of parties, and they have reported in such a manner, that the court can render a judgment upon the basis of a partnership adjustment, the form of the action should be disregarded, and such a judgment be rendered, and it

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is claimed that the decisions of this court in relation to the effect of referring cases to referees have gone to this extent.

The cases on this subject are very numerous in our reports, and the language of the different judges not very uniform as to the precise rule on the subject.

The general doctrine to be extracted from all the cases seems to be this: that where parties agree to an arbitration or reference of a pending action, under a rule of court, so that the court are to render a judgment on the report or award, even where it is a part of the submission or rule of reference, that the arbitrator or referee is to be governed by the rules of law, it is the cause of action which forms the basis of the submission, and not the particular form of the declaration which the party has adopted, or any particular issue which may have been formed upon it, and that therefore the referee is not bound by the particular declaration and pleadings, but may award upon the subject matter of the suit without regard to them. An arbitration or reference under a rule of court stands upon the same general principle, as do all arbitrations, the mere agreement of the parties; and the power of the arbitrator or referee extends to just what the parties have agreed to submit, and no more; and if he undertakes to try and award of other matters not submitted, the award is invalid. It is conceded that the only matter for which the plaintiff brought his suit, was the money he paid on the note to the bank, and not to recover any general partnership balance that might be due to him, and his declaration could not have been amended so as to have enabled him to do so, for it would not only have required an entire change of the form of the action, but to introduce a new cause of action, which the court have no power to allow.

The cause of action then, which formed the basis, and the extent of the submission, was the money paid on this note; this was what the plaintiff claimed to recover before the referees, and what he claims now.

Nor can it be claimed that the submission was extended by consent before the referees, for they state in their report, that neither party claimed to go into a settlement of the partnership matters before them, or assented to their doing so.

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Their report then, so far as it furnishes a basis for a judgment for the partnership balance, was upon matters not embraced in the submission, and we cannot therefore properly render judgment upon it.

As the note was given for money that went into the partnership, and the plaintiff is not entitled to claim that he stood merely as a surety upon it for the defendants, we think it can be settled only in some proper action brought to close the whole partnership affair. We have sought earnestly to find some ground on which we could justify a judgment for what appears to be the partnership balance due to the plaintiff, as that appears to us to be where the matter must at last stand between them, but we feel that it cannot be done without violating settled principles.

The judgment is affirmed.

DANIEL PACKER v. ELIAS H. STEWARD.

*Alteration of Parol Contract. Statute of Frauds. Evidence.
Breach of Contract.*

Where a contract, not reduced to writing, is taken out of the operation of the statute of Frauds by the payment of earnest money, it does not contravene the spirit or policy of the statute to allow its terms to be varied by parol in respect to the time of its performance.

If A., by parol contract, purchase goods of B., to be delivered at a future day, and earnest money be paid, a sale of the goods by B. to a third person before the time for the performance of the contract with A. has expired, will entitle A. to recover of B. the earnest money so paid, under the money counts, and will excuse A. from any duty to tender performance on his part.

And if A., after such sale by B. to a third person, and before the expiration of the time limited for the performance of his contract, tender the performance of it on his part, he may maintain an action against B. for the recovery of proper damages for such breach of contract.

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ASSUMPSIT. Plea the general issue, and trial by jury at the March Term, A. D. 1860. PIERPOINT, J., presiding.

The plaintiff's evidence on the trial tended to show that on or about the 25th day of November, A. D. 1858, he went to the defendant's house in Clarendon, and after examining the defendant's wool, estimated at about twenty-five hundred pounds, made a contract with the defendant to purchase the same, at the price of forty-six cents per pound, and to pay the purchase money therefor, with the interest thereon, and take the wool away on or before the 15th day of December then next ensuing; and that at the time of making the contract the plaintiff paid fifty dollars to the defendant as earnest money, or in part payment for the wool.

The evidence further tended to show that the plaintiff, not having sold the wool as he expected, on the 11th day of December, went to Clarendon, where he saw the defendant, and informed him he might not be able to pay for the wool by the 15th, as he had not sold it, but that he thought he should be able to sell it in January, and that it was finally agreed to extend the time to the first of February; that on the 27th day of January, 1859, he again went to the defendant with one Bottomly, with whom the plaintiff was in negotiation to sell that and other lots of wool, and introduced Bottomly to the defendant, and told him that they had come to examine the wool, with a view to a purchase by Bottomly; that the defendant assisted the plaintiff and Bottomly in overhauling and examining the wool, and after they got through, the plaintiff told the defendant he should probably sell the wool to Bottomly, and he would be at the defendant's place and take and pay for the wool, as soon as Bottomly could go down to Leicester, Mass., where he resided, and get back with the money and his sacks for sacking the wool, and that he would inform the defendant of his sale to Bottomly; to which the defendant said, "very well;" that he sold the wool to Bottomly, who started the next morning for his home in Massachusetts, to procure the money and sacks; that the plaintiff sent a request by Joseph Packer, Jr., to one John Miller, of Wallingford, that he would, in behalf of the plaintiff, inform the defendant that the plaintiff had sold the wool to Bottomly, and that the defend-

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ant had since admitted to him that he had received the message ; that the said Bottomly returned to the residence of the plaintiff in Mount Holly, in the afternoon of the 1st of February, and that he and the plaintiff went to the residence of the defendant, about nine o'clock in the morning of the 2d day of February, with the sacks and money, prepared to pay for and take away the wool, and so informed the defendant, who then said he had sold the wool to one Langdon for fifty cents per pound, and refused to let the plaintiff have it.

Joseph Packer, Jr., a witness introduced by the plaintiff, testified, that on Saturday, the 29th of January, just at night, he met the defendant near his home, when the defendant said, "I understand your uncle (naming the plaintiff,) has sold his wool;" to which the witness replied that he had; and that he, the witness, had carried a message from the plaintiff to John Miller, requesting him to inform the defendant of that fact; that the defendant replied that his father-in-law, Deacon Button, had received a letter from Miller to that effect, and that he was glad the wool was sold, as he feared the plaintiff would hold on too long. The witness then said, "Uncle is fearful Bottomly will not get here in time, it is so stormy;" to which the defendant replied, "It will make no material difference if he does not get here in two or three days."

The plaintiff further offered to prove that owing to unusual snow storms, ensuing between the 27th day of January and the 2d day of February, the railways and highways were so blocked up, that Bottomly was unable, between the 27th day of January and the expiration of the 1st day of February, to go to his home in Massachusetts and get back to the defendant's place at an earlier period than he did, which testimony was objected to by the defendant and excluded by the court.

The plaintiff also offered to prove that the defendant sold his wool to Langdon on the 1st day of February, 1859, which testimony was likewise objected to by the defendant and excluded by the court.

The court held that the evidence introduced by the plaintiff was insufficient to sustain the action, and directed a verdict for

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the defendant. To the several rulings of the court the plaintiff excepted.

D. E. Nicholson and *Daniel Roberts*, for the plaintiff.

E. Edgerton and *E. J. Phelps*, for the defendant.

KELLOGG, J. The plaintiff's evidence on the trial of this case tended to show that on the 25th November, 1858, or about that time, he made a contract with the defendant for the purchase of his lot of wool, estimated to be about twenty-five hundred pounds, at the price of forty-six cents per pound, and that, by the contract, the wool was to be paid for, with interest, and taken away by the plaintiff, by the 15th December following; that, at the time of making the contract, the plaintiff paid fifty dollars to the defendant as earnest money or in part payment for the wool, and that, on the 11th December, 1858, it was agreed between the plaintiff and the defendant that the time for the payment of the balance of the purchase money, and for the delivery of the wool, should be extended from the 15th December to the 1st day of February following. Neither the original contract nor the agreement for its extension were in writing. The only question made upon this part of the case by the defendant, is that this enlargement of the time for the performance of the original contract constituted a *new* contract, and that, as it was not in writing and no additional earnest money was paid, it falls within the statute of frauds. Where a particular time is appointed by the terms of the contract of sale for the delivery of and payment for property of a fluctuating value, and the payment and delivery are to be concurrent acts, the time so appointed is of the essence of the contract. The original contract for the purchase and delivery of the wool was taken out of the statute of frauds, when it was made, by the payment and acceptance of the earnest money. While it remained executory, and in unquestioned force, it was varied by the agreement of the parties only in respect to the time for its performance. An alteration by parol of the terms of a written contract under the provisions of the

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statute of frauds cannot be binding, for the reason that the alteration creates a new contract which it would be necessary to prove partly by parol evidence, and this principle applies as well to contracts for the sale of goods, wares, and merchandize as for the sale of lands. *Stead v. Dawber*, 10 Ad. & El. 57, (37 E. C. L. 40.) *Marshall v. Lynn*, 6 Mees. & Welsb. 109. But where a contract for the sale of goods is taken out of the statute of frauds by the payment of earnest money, and, as in this case, is not reduced to writing, it does not contravene the spirit or policy of the statute to allow its terms to be varied by parol any more than it would to allow the terms of the original contract to be thus proved. In such a case, the original contract is treated as still remaining, and no new consideration is requisite for an alteration of its terms in respect to the time for its performance,—“the consideration for the old agreement being imported into the new agreement which is substituted for it,”—as was said by Lord DENMAN, C. J., in *Stead v. Dawber*, *ubi supra*. We think, therefore, that it was competent for the parties to this contract to extend or vary the time for its performance, by a subsequent parol agreement, at any time while it remained executory, without any new consideration.

The question then arises, whether the plaintiff's evidence tended to show such a waiver or extension by the defendant of the time for the performance of this contract as bound him to accept the plaintiff's offer of performance made on the 2d day of February, 1859. It is claimed on the part of the plaintiff that the evidence in respect to the interview between himself and the defendant on the 27th January, 1859, tended to show such a modification of the terms of the original contract. At the time of this interview, the contract as limited to the 1st February was in admitted force; and the plaintiff's testimony tended to show that he, with one Bottomly, a wool dealer, went to the defendant's house in Clarendon, and examined the wool, and that the defendant assisted in the examination, and then knew that the plaintiff was negotiating with Bottomly, for the purpose of selling to him this lot and other lots of wool; and the proof is, that the plaintiff told the defendant, on that occasion, that he should probably sell the wool to Bottomly, and that he would come and

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take and pay for the wool as soon as Bottomly could go to Leicester, Massachusetts, where he resided, and get back with the money and sacks for sacking the wool, and that he would inform the defendant of the sale which he expected to make to Bottomly, to which the defendant replied "very well." This was a proposition by the plaintiff to take and pay for the wool as soon as Bottomly could go to Leicester, and return with the money to pay for it and the sacks for sacking it, in case the plaintiff should sell the wool to him as the result of the pending negotiation with him, and to give the defendant notice of such sale to Bottomly if it should be made; and the proposition implied that Bottomly should use reasonable diligence in making the journey to Leicester, and on his return. If, in the exercise of such diligence, Bottomly could have performed the journey before the 1st February, this proposition would not have required any extension of the time for the performance of the contract, but, if he could not have made the journey by the use of such diligence before that time, then the proposition necessarily implied an extension of the contract to such time beyond that day as would allow to Bottomly an opportunity by the use of reasonable diligence to make the journey. In this light it was a proposition to waive or extend the time for the performance of the contract, and to treat and act upon the contract as a continuing contract after the appointed period; and the testimony of Joseph Packer, Jr., tended to show that the defendant so understood the proposition. We are of opinion that this testimony was proper for the consideration of the jury, and should have been submitted to them as tending to show such an extension of the contract beyond the appointed period by the consent of the defendant, and, in its connection with the other evidence in the case in respect to the plaintiff's performance of the terms of the proposition on his part, as tending to support his action. The question whether Bottomly did use reasonable diligence in making his journey, and returning, depended upon the facilities and actual hazards and casualties connected with the usual course of travel on the route over which it would be necessary for him to pass, as existing at that time; and the testimony which was offered on the part of the plaintiff to show that the railways and

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highways on the route of travel, between the defendant's residence in Clarendon and the residence of Bottomly in Leicester, were obstructed and blocked up with snow drifts was proper to be taken into consideration in determining this question, and the question itself, on the testimony offered, was one of fact which should have been submitted to the jury.

The plaintiff offered to prove on the trial that the defendant sold his wool to one Langdon on the 1st day of February, or before the time for the performance of the contract between the plaintiff and defendant had expired. Understanding this as an offer to prove such a sale of the wool by the defendant as passed the property in it from him to Langdon, so that the defendant thereby disabled himself from performing his contract with the plaintiff, we regard this evidence as clearly admissible. A sale by the defendant to a third party before the time for the performance of his contract with the plaintiff had expired, was a breach of that contract, which, whether it was known to the plaintiff or not, excused the plaintiff from any duty to tender a performance of it on his part, and it would entitle him to recover from the defendant, under the money counts, the money which he had paid under the contract. And if, after such sale by the defendant to a third person, the plaintiff had, before the expiration of the time limited for the performance of his contract, tendered a performance of it on his part to the defendant, he could have maintained an action against the defendant for the recovery of proper damages for such breach of contract. *Bowdell v. Parsons*, 10 East. 359. *Newcomb v. Brackett*, 16 Mass. 161. Addison on Contracts, 236.

We have not considered the questions of variance between the plaintiff's proof and his declaration which were suggested on the argument; as, in the view which we take of the evidence, it tended to support the money counts in the declaration, even if it was applicable to no other counts. As the result of our conclusions, the judgment of the county court for the defendant is reversed, and the cause is remanded to that court for a new trial.

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EBENEZER LEACH v. FAYETTE BLAKELY.

Grand List. Appeal from Listers. Construction of Statute.

On the question whether the selectmen, under the provisions of the Act of 1855, No. 43, secs. 26, 27, are authorized to raise an assessment, on appeal, above the sum established by the listers; *held*, that the word "appeal," as used in both of the sections, denotes an application for relief, and that therefore the power of either board is limited to the granting of relief by reducing the assessment complained of, or to the denial of any relief.

TRESPASS. The declaration alleged that the defendant, on the 15th day of July 1859, at Pawlet, in this state, assaulted, imprisoned, and detained the plaintiff, without any reasonable cause, and thereby compelled the plaintiff to pay the defendant the sum of one hundred dollars, etc. The defendant, besides pleading the general issue, also filed a special plea, in which he set forth, that at a meeting of the inhabitants of the town of Pawlet, duly warned and held on the first Tuesday of March, 1859, by vote of the inhabitants a town tax of twenty-five cents on the dollar of the grand list of the town for the year then ensuing was raised; that the plaintiff was an inhabitant of the town on the first day of April, 1859, and had taxable property therein; that the listers of the town assessed the plaintiff for money on hand and debts due and to become due to him, in the sum of eight thousand dollars, of which the plaintiff was duly notified, and also notified him that they would hear his appeal, if aggrieved, at the town clerk's office, in the town of Pawlet, on the tenth day of April, 1859, at 12 o'clock, noon; that the plaintiff appeared on that day before the listers and was heard by them on his appeal, and, after hearing, the listers decided to assess the plaintiff for money on hand and debts due and to become due to him, in the sum of five thousand dollars; that the plaintiff appealed from the decision of the listers to the selectmen of the town of Pawlet; that the matter of the appeal was heard and tried by the selectmen on the twenty-third day of April, 1859, who, upon a consideration of the evidence, decided that the plaintiff be assessed for money on hand, and debts due and to become due to him, in the sum of ten thousand dollars; that a tax of twenty-five cents on the dollar was duly assessed by the select-

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men in pursuance of the vote of the inhabitants of the town, amounting to the sum of twenty-five dollars on the plaintiff's list; that a tax bill, and warrant for the collection of the same, were made and placed in the hands of the defendant as first constable and collector, to levy and collect; that on the first day of July, 1859, the defendant gave the plaintiff notice of the sum in which he was assessed and that the defendant would attend at the plaintiff's dwelling house on the eighth day of July, 1861, to receive the tax; that the defendant did so attend; that the plaintiff did not attend, nor pay the tax, but neglected and refused so to do; that thereupon, the plaintiff not having any goods, chattels, or estate, to be found in the precinct of the defendant, whereon to make distress, the defendant, as such constable and collector, arrested the plaintiff, which was the supposed trespass complained of, etc. To this plea the plaintiff filed a general demurrer.

The court, at the September term, 1860, PIERPOINT, J., presiding, adjudged *pro forma*, that the plea in bar was sufficient, and rendered judgment for the defendant, to which the plaintiff excepted.

E. Potter and *H. Allen*, for the plaintiff.

J. B. Bromley and *Linsley & Prout*, for the defendant.

KELLOGG, J. The principal question which arises on the plea in bar in this case, calls for the construction of the provisions of the statute now in force, relating to the grand list, in respect to the remedy on an appeal from the listers to the selectmen by a person agrieved by an assessment made by the listers for money on hand and debts due. (Act of 1855, No. 43, p. 53, sec. 26, 27.) The plea states, *inter alia*, that the listers of the town of Pawlet, in the month of April, 1859, assessed the plaintiff, an inhabitant of that town, in the list of said town for that year in the sum of eight thousand dollars for money on hand and debts due and to become due to him, and that, on his appeal, the listers reduced this assessment to the sum of five thousand dollars, and that thereupon the plaintiff, feeling aggrieved by the decision of

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the listers, appealed to the selectmen of that town, who, on a hearing pursuant to the statute, decided to raise the said assessment to the sum of ten thousand dollars, which last mentioned sum was thereupon entered in the list, and included in the personal estate set to the plaintiff in the list. The question is, whether the selectmen were authorized by the statute to raise an assessment, on appeal, above the sum established by the listers.

The statute provides in sec. 26, above cited, for an "appeal" from the listers to *themselves*, and, in sec. 27, for an "appeal" from the listers to the selectmen, by a person "feeling aggrieved" by his assessment or by the decision of the listers. An *appeal* in law is the removal of a matter or cause from an inferior to a superior court for the purpose of reviewing, correcting, or reversing the judgment or sentence of the inferior tribunal; but this is not the sense which is conveyed by the use of the term in sec. 26; for the appeal in the first instance is to be taken from the listers, not to another board, but to *themselves*. In this section, the use of the word "appeal" clearly denotes an *application for relief*, to be obtained by a reconsideration or review of the previous action, and by a reduction of an assessment already made. The listers are not authorized, upon such reconsideration or review, to *increase* the assessment, but they may deny the relief sought. We think that the term "appeal," when applied to the same subject matter and the same proceeding, should be interpreted as having the same definition and force in both of these sections. It is true that the listers and the selectmen act in a judicial capacity in determining appeals, but if we consider the exclusive purpose of the proceeding to be an application for *relief*, it must follow that, whether taken to the listers or to the selectmen, the power of either board is limited to the granting of the relief sought by reducing the assessment complained of, or to a denial of any relief whatever. By collating these two sections with each other, it is evident that the same rule of construction which would allow the selectmen to add to an assessment on appeal would also allow the listers to add to an assessment on an appeal to them, for similar language is used in regulating and defining the duties of each board in respect to appeals.

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In our opinion, the power to increase an assessment upon appeal was not conferred by the statute upon either board, and ought not to be recognized unless found to be clearly intended by the statute. A reasonable doubt in respect to the existence of this power should be resolved against it, when it is supported only by a supposed analogy to the course of judicial proceedings on an appeal, and is not expressly granted by the statutes.

The result of this view of the case is, that the assessment of the plaintiff by the selectmen, as stated in the plea in bar, was not authorized by law, and that the tax upon the same was illegal. This conclusion being decisive against the plea in respect to its substance, we have not considered the other objections which have been urged against it in respect to its sufficiency and form. As the demurrer to the plea should, in our judgment, have been sustained, the judgment of the county court in favor of the defendant is reversed, and the plea is adjudged insufficient, and the cause is remanded to that court for further proceedings.

CASES
ARGUED AND DETERMINED
IN THE
SUPREME COURT
OF THE
STATE OF VERMONT,
FOR THE
COUNTY OF BENNINGTON,
AT THE
FEBRUARY TERM, 1861.

PRESENT:

HON. LUKE P. POLAND, CHIEF JUDGE,
HON. ASA O. ALDIS,
HON. JOHN PIERPOINT, } ASSISTANT JUDGES.
HON. ASAHIEL PECK,

HENRY F. DEWEY v. SAMUEL FAY.

Receiptor. Levy of Execution.

The legal meaning of the contract of a receiptor is, that he will have the property attached forthcoming, upon demand made for the same by the officer, to respond the execution that may issue upon the judgment obtained in the suit in which the property is attached.

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When the receiptor actually has the property in his possession, and the execution expires in the hands of the officer, without any demand made for the property to apply on the execution, the debtor is entitled to a return of his property free from the lien created by the attachment. Neither the creditor, the officer, nor the receiptor may withhold it from him.

If there is no demand made upon the receiptor for the property, within the life of the execution, he is discharged from his liability to the officer.

TROVER for certain property specified in a certain receipt, dated June 1, 1857, executed to the plaintiff by B. F. Fay and the defendant. Plea the general issue, and trial by the court at the December term, 1859,—KELLOGG, J., presiding.

It appeared that one Patchin commenced a suit against B. F. Fay, returnable to the June term of the county court, 1857; that the writ was served on Fay by the plaintiff, as constable of the town of Bennington, on the first day of June, 1857, by attaching his property; that thereupon Fay and the defendant executed and delivered to the plaintiff a receipt for the property attached; that at the December term of the county court, 1857, Patchin recovered a judgment in his suit against Fay for two hundred and twenty-seven dollars and forty cents damages, and seventeen dollars and fifty-three cents costs; that on the 4th day of January, 1858, Patchin took out an execution on his judgment, and put it into the hands of an officer to levy and return; and that the officer holding the execution on the 2d day of February, 1858, made a demand upon the plaintiff for the property attached, for the purpose of levying the execution upon it; but the plaintiff did not deliver the property to the officer, but did deliver to him the receipt executed by B. F. Fay and the defendant. The issuing of the execution, the delivery of the same to the officer, and the demand upon the plaintiff, were each within thirty days from the time of rendering the judgment. On the 15th day of February, 1858, B. F. Fay died, and the officer delivered the execution back into the hands of Patchin, within the life of the same. But it further appeared that Patchin did not intend by receiving back the execution to release, or in any manner affect, his right to pursue or hold the property attached, or to waive or abandon his lien under the attachment, or to affect in

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any manner his rights or remedy against the plaintiff for not delivering the property to the officer on demand.

No demand was ever made on B. F. Fay for the property, and no demand was made by the plaintiff on the defendant until sometime in December, 1858, just prior to the commencement of this suit.

Patchin did not present any claim against B. F. Fay's estate before the commissioners, although letters of administration had been granted, and commissioners were appointed on the estate, and the time allowed for presenting claims before the commissioners had expired.

Upon these facts the court decided that the plaintiff was entitled to recover of the defendant the amount due upon the execution, with interest.

To this judgment the defendant excepted.

———, for the defendant.

T. Sibley, for the plaintiff.

ALDIS, J. By our system of attachment of personal property, the creditor must perfect his lien by obtaining judgment, taking out execution within thirty days, and delivering it to the officer who made the attachment, or demanding of him the property. Such delivery to or demand upon the officer within the thirty days is held to be a taking upon the execution within the meaning of the statute. C. S., § 83 of Chap. 31.

Must the execution be levied on the property, or demand made on the receptors to charge them? If the officer has the property in his hands, it is his duty to levy the execution upon it within the sixty days, the life of the execution, and proceed to a sale of it in due course of law. If he do not so proceed within the life of the execution, the property is discharged from the attachment, and the owner may reclaim it, or any other creditor may attach it.

So, if the property is not in his hands, but in the hands of a servant, he must make demand, and proceed to sell in the same manner.

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If the property is in the hands of the owner the officer must do the same, or the lien is gone.

In all the cases enumerated above it is quite obvious, that if there is no levy or demand made by the officer in the life of the execution, the lien is discharged. Is the rule different where a receptor intervenes?

The legal meaning of the contract of the receptor is, that he will have the property attached forthcoming, upon demand made for the same by the officer, to respond the execution that may issue upon the judgment obtained in the suit in which the property is attached; and if he fail to do so, he will pay the execution and costs.

Must this demand by the officer upon the receptor be made within the life of the execution, and, if it is not so made, is the lien of the creditor upon the property gone, so that the officer has no remedy against the receptor?

Where the receptor actually has the property in his possession, and the execution expires in the hands of the officer without any demand made for the property to apply on the execution, we think the debtor is clearly entitled to a return of his property, free from the lien created by the attachment. Neither the creditor, the officer, nor the receptor may withhold it from him. The law which provides that the property must be taken in execution in thirty days, fixes that period of time that the debtor may know whether his property is to go upon the execution or not; that there may be no indefinite delay, keeping the payment of the judgment, the disposition of the property, and the rights of the owner or of other creditors in unreasonable suspense. It is for the interest of all that these questions and interests should be settled promptly. The reason that provides for the taking in execution in thirty days requires that the property thus taken in execution should be disposed of upon the execution according to its legal tenor, and within its life. If it is in the power of the officer or creditor to postpone the levy upon the property beyond the life of the execution, it is obvious there is no definite limit to their power to do so; and the rights of the debtor and of others may be seriously injured. With such a right in the

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attaching creditor, the receptor would never know when his liability was ended; nor the owner when he could demand a restoration of his property; nor other creditors when they could proceed with subsequent attachments; nor purchasers when they could buy with safety. The very idea of taking in execution implies that the levy and sale are to be completed under the authority of the same execution, and of course in its life; the taking being but a means to this end.

If this delivery of the execution to the officer within the thirty days—which in the eye of the law is the same as a taking in execution—must be followed by an actual taking within the life of the execution, in order to hold the lien good against the debtor, it seems quite clear that the receptor may well understand if there is no demand made upon him for the property within that time in order to consummate such actual taking, that it is because the officer does not intend to proceed with the collection of the execution out of the property. He may therefore regard himself as discharged from his liability to the officer. And this we understand to be in practice the course that is taken by the profession, by officers, and the community generally, in regard to the collection of executions, and the liability of receptors.

We do not find a direct decision upon this point, but the decisions which have any connection with the question tend to this result.

In the early case of *Enos v. Brown*, 2 D.Chip. 280, the point was made that the statute required not only that the execution should be delivered to the officer within the thirty days, but that the property should be actually taken, or demand upon the receptors be actually made within that time. The counsel, (Judge Hutchinson,) did not contend that a demand on the receptors within sixty days was not necessary to charge them, and both the argument and the opinion of the court seem to recognize that a demand within that time would be necessary. Ch. J. CHIPMAN says: "If the execution is delivered to the officer in thirty days, he then, in the true sense of the law, has the property in execution, and he has until the return day of the execution to levy the money of that property."

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IN *Bliss v. Stevens*, 4 Vt. 38, the remarks of Ch. J HUTCHINSON are to the same point: "It is a necessary construction of the receipt, that the officer may demand the property of the receiptors at any time in the life of the execution, so as to levy upon and sell it under the authority of the execution."

He refers to the case in the 2d of Tyler, *Strong v. Hoyt*, where the demand was made after the expiration of the execution, but the property actually converted before the judgment was rendered,—a circumstance which does not appear in the case at bar.

The debtor and this defendant both signed the receipt, and the property attached may therefore be fairly presumed to have gone into their joint possession. In case of such joint possession of the debtor, who is the general owner of the property, with another, if no demand of the property was made in the life of the execution, the owner and the defendant might well consider the lien by attachment abandoned, and his absolute ownership restored. And in such case, the property being in the possession of the owner, the officer could have no right to pursue the defendant on the receipt, on account of a liability to the owner.

The omission of the plaintiff to make a demand upon the receiptors for the property within the life of the execution being held fatal to his right of recovery upon the receipt, it is unnecessary to consider the other questions raised upon the argument.

Judgment reversed, and judgment for the defendant for his costs.

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STARK BANK v. U. S. POTTERY COMPANY.

Corporation. Directors. Ratification. Usury. Evidence.

The assuming of a debt against a third person is not within the ordinary powers of the treasurer of a corporation. It is not in the usual course of business, and some special authority so to do must be shown.

The facts disclosed in this case do not show any special authority.

The directors of a corporation have not power to assume such a debt except in case of urgent necessity, which is a question of fact for the jury.

Although such urgent necessity exists, still when there were only seven directors, and it appeared that three of those, who were relied upon to make a majority assenting to assuming the debt, were liable on the debt assumed, *held*, it must further appear that they acted in perfect good faith to the corporation, and that this was a question for the jury.

When it appeared that the debtor transferred a large amount of stock to the defendants a few days after the debt was assumed as security for his indebtedness to them, but it also appeared he owed them a large sum besides the debt; *held*, that the receipt of this stock could not be treated as a ratification of the act of assuming the debt, in the absence of proof that it was received as security for this particular debt, and that this was known to the directors.

When a witness testified that he supposed a note, by the laws of New York, was void for usury, but there was no evidence as to the provisions of the New York Statutes or what constitutes usury by the laws of that State; *held*, that the court did not err in not directing the jury that the note was void for usury, although it was payable at Troy, N. Y., and was discounted here at 8 per cent.

ASSUMPSIT on three promissory notes, one for five thousand dollars, one for six hundred and eleven dollars and twenty-eight cents, and one for two thousand two hundred and forty dollars and thirty-eight cents. Plea, the general issue.

No defence was made to the two first notes. As to the other, it appeared that in the fall of 1857 the defendant had been doing business for a number of years with the plaintiffs, and had borrowed money of them from time to time to a large amount, for the purpose of carrying on their business, under a guaranty to the plaintiffs signed by one Archer. In September, 1857, the directors of the defendants' company were seven, among whom were Archer, Fenton, and Johnson. Gager was the treasurer, and

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also selling agent at Boston. Johnson was selling agent in New York, and Fenton at Bennington. At this time the defendants were indebted to the plaintiffs for five thousand six hundred dollars. The plaintiffs also had paper against Fenton individually, endorsed by Gager and Johnson for two thousand two hundred dollars and fifty-nine cents. On the 28th of September, 1857, the defendants being embarrassed, asked an extension on their liabilities to their creditors. The plaintiffs wrote Gager at Boston, assenting to the extension, provided the corporation would assume the debt from Fenton to them. In November, 1857, Gager replied, agreeing to this proposition. Soon after, Fenton gave the plaintiffs three notes signed "U. S. Pottery Co., by C. W. Fenton, agent," payable to Fenton or order at Troy, N. Y., and by him endorsed, which were discounted at 8 per cent. by the plaintiffs. These notes included the amount then due from the defendants to the plaintiffs, as well as the Fenton debt. Fenton, Johnson and Gager also executed a guaranty to the plaintiffs for the payment of the notes. The old notes were not then given up, but a few days afterwards Rhodes, another director, called and took them. The notes fell due in February, 1858, when Gager took them up by giving renewal notes signed "U. S. Pottery Co., by U. A. Gager, Treasurer."

There was no evidence of any express authority by vote of the corporation to either Fenton or Gager, to assume the debt of Fenton, or assenting to the proposition of the bank that they should assume the debt; but it appeared that Fenton had sometimes executed the defendants' notes as agent, and that Gager was accustomed to negotiate loans and execute notes and bills for the defendants in the usual course of business, which was always assented to by the directors, but neither of them ever executed the defendants' notes for the debts of others before.

It also appeared that Fenton, the debtor, on the 28d of November, 1857, transferred to the defendants one thousand one hundred and ninety shares of stock as security for his indebtedness to them, which was a large sum besides the debt assumed by the defendants, as above stated,

The defendants requested the court to charge the jury as follows :

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1. That the facts not being in dispute, and the evidence not conflicting, there was no question for the jury.

2. That upon the facts as appearing, the plaintiffs were not entitled to recover upon the note for two thousand two hundred and forty dollars and thirty-eight cents.

3. That the note having been given for the private debt of C. W. Fenton, with which the defendants had nothing to do, and for which they were in no way liable, the defendants were not bound by the note unless Gager had authority to give it.

4. That no such authority was shown.

5. That the transaction was usurious, and the note therefore void.

But the court, KELLOGG, J., presiding, directed a verdict for the plaintiffs, to which the defendants excepted.

G. W. Harmon and T. Sibley, for the plaintiffs.

A. P. Lyman and E. J. Phelps, for the defendants.

PECK, J. This action is against the defendant as maker of three promissory notes, dated at Bennington, February 15th, 1858. The defendant makes no defence to two of the notes, but denies its liability on the other, being the note for two thousand two hundred and forty dollars and thirty-eight cents.

The first objection on the part of the defence, is that the treasurer who executed the note in behalf of the company, was not authorized thus to bind the defendant.

There can be no doubt of the authority of Gager, the treasurer, to execute notes in behalf of the company in the ordinary course of business, if he had previously acted as the financial agent of the company, and been in the habit of borrowing money, executing notes, drawing drafts and accepting bills, etc., in behalf of the company, with the knowledge and sanction of the directors of the company, as the evidence tends to show, but it still remains to be seen, whether the note in question, under the circumstances of the case, came within the scope of his powers. We think not. It was not in the ordinary course of business, and, to give validity to the note in question, some special authority must be shown or some ratification of the act

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by the company or its directors, especially as the note was given for the debt of Fenton, on which Gager was holden as surety, and with which the company had no connection, and as Fenton, who was an agent of the company, acted in concert with Gager in substituting the note of the company for their liability.

The evidence, as appears from the minutes of the testimony referred to, tends to show that the bank on or about the 14th of November, 1857, held several notes against the Pottery Company, amounting to about five thousand six hundred dollars, which had accrued under an arrangement with the defendant by which they discounted its notes from time to time, and also held a note against Fenton of about two thousand two hundred dollars, on which Johnson, one of the directors of the company, and said Gager were holden as indorsers, but with which the company had no connection. Johnson was also the selling agent of the company in New York, and Gager the agent in Boston, and Fenton at Bennington, where the business of the company was carried on. In order to procure an extension or continuance of the loan of the company at the bank, Gager agreed with the bank to give the note of the company for the amount of the Fenton debt, and in pursuance of that agreement, Fenton, who it appears had been in the habit to some extent of executing notes on behalf of the company, executed a note to the bank for the Fenton debt, and the loan to the company was thereupon extended or continued. The note in question is a renewal note, substituted for the one thus executed by Fenton in behalf of the defendant.

All this, it appears, was known to the bank at the time of the transaction. There was no evidence that either Fenton or Gager had in any other instance used the name of the company as surety or in assuming liabilities of others; and in relation to Gager, the evidence tends to show that this is the only instance of such use of the company name.

Under these circumstances and the other facts appearing in the case, we think the agency of Fenton and Gager did not authorize them, or either of them, to pledge the credit of their principal upon this note, without the assent of the company or a majority of its directors to the transaction. This, it was incumbent on the plaintiff to show. Here two questions arise;—first,

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whether the directors had the power to authorize the giving of the note, for if they had not, then their assent or ratification would be inoperative; secondly, whether a majority of the directors did assent to or ratify the act.

It is true the company received an extension of their loans at the bank in consideration of the assumption by them of the Fenton debt. This is a sufficient consideration, technically, to sustain the note if the act was within the scope of the powers of the directors, but it does not follow that, because there was a consideration for the note, the directors had power to execute it. It must also appear that it was a transaction within the scope of the powers of the directors who are but agents of the corporation. The directors had no such power unless under the circumstances there was an urgent necessity of doing it in order to save the credit of the company and enable them to go along with their business. If there was such necessity, making it for the interest of the company to enter into such arrangement, it was within the scope of their powers as directors, otherwise not. But as some of the directors were individually liable on the Fenton debt, for which the note in question was given, and their assent is relied on to make a majority, the note is not binding unless the transaction was in good faith towards the company, since some of the directors had an interest in casting their personal liability on the company and this was known to the bank at the time of the transaction. The question whether there was such an urgent necessity as to authorize the directors to make or sanction the arrangement, and whether they acted in good faith, are questions which should have been left to the jury under appropriate instructions. The court therefore erred in directing a verdict for the plaintiff. The question whether a majority of the directors did assent to, adopt or ratify the transaction, should also have been left to the jury under proper instructions. The evidence relied on by the plaintiff's counsel on this point is not of such an unequivocal character as to amount necessarily in law to a ratification or adoption of the act by a majority of the directors, even if the court could assume it all to be true, as it consists to some considerable extent in inferences and presumptions to be drawn from the facts testified to by the witnesses.

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It is claimed among other things by the plaintiff's counsel, that the transfer of the stock by Fenton to the company and its acceptance by them is in law a purchase of the stock in consideration of the assumption of this debt. If it clearly appeared that such was the contract it might give validity to the note, but the evidence fails to show this. The note executed for the Fenton debt and for which the note in question is a renewal, was executed on the 14th of November 1857, and the stock was not transferred till November 23d, 1857, and then without any communication with the directors of the company, and, for aught that appears, without the knowledge of any of them except Rhodes, the clerk, who it seems was a director, and without any special reference to this debt, but to secure Fenton's general indebtedness to the company, he then owing them six or seven thousand dollars independent of this debt, and this debt, it appears, was never charged by the company to Fenton—at least the evidence tends to show this. It is therefore quite clear that this cannot be as matter of law a ratification of this transaction;—it is at most but evidence to be submitted to the jury with the other evidence in the case on this point.

It is claimed by the defendant's counsel that the county court erred in not instructing the jury that the note was void for usury under the laws of New York where the note is made payable. The only evidence before the county court as to the laws of New York, was that of Mr. Harmon on cross-examination, who said: he supposed that by the laws of New York the security for debt is avoided for usury. There was no proof of the provisions of the statute of New York, or what constitutes usury by the laws of that state. We are referred in argument to the statute of New York, but the question for this court to decide is whether the county court erred, which must be determined by reference to the evidence on which that court was called upon to act. We see no error in the refusal of the county court to charge as requested on this point. What the ruling should be with the statute of New York properly before the court upon the evidence, must be left for a future trial if the counsel choose to raise the question.

Judgment reversed and new trial granted.

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LEWIS J. SPRAGUE v. ORANGE J. TRAIN.

Principal and Agent. Contract. Assumpsit.

Where the defendant proposed to sell the plaintiff a quantity of cheese, and told the plaintiff that if he notified him the next day, the plaintiff should have it on the terms proposed, and the next day the plaintiff sent L. to the defendant for the purpose, and no other, of notifying the defendant that he would take the cheese on the terms proposed, and to pay the defendant ten dollars, and thereupon the defendant refused to take the ten dollars unless the plaintiff would take, and pay for, the cheese by the middle of the week following, and L. told the defendant that the plaintiff would take and pay for it by that time, and if he did not the ten dollars would be forfeited; *held*, 1st. That the refusal of defendant to accept the ten dollars unless the cheese should be taken by the middle of the week following was a repudiation of the proposal of the preceeding day, which he had a right to make. 2d. That L. had no authority to bind the plaintiff to take and pay for the cheese the next week following. 3d. That the plaintiff not having affirmed the agreement of L. by offering to take and pay for the cheese by the middle of the week following, the defendant was not liable for refusing to deliver it afterwards. 4th. That the ten dollars having been paid on conditions which L. had no right to make, it might be recovered in this suit.

ASSUMPSIT. The case was referred and the referee reported as follows :

"It appears that on the 10th day of November 1858, the plaintiff called on the defendant for the purpose of buying the defendant's cheese. The cheese was examined and about seventy in number of them, estimated by the parties to weigh four thousand pounds, were regarded by them fit for market. The defendant offered to sell the cheese to the plaintiff for 8 1-2 cents per pound and deliver the same at the railroad depot, either at Granville, in the state of New York, or at Danby, as the plaintiff desired. The cheese was to be weighed at the defendant's house in Pawlet, and to be taken and paid for by the plaintiff, if he could, the following week, or as soon thereafter as he could attend to it. The plaintiff did not then accept of the defendant's offer, but the defendant agreed that if the plaintiff should notify him the next day of his, the plaintiff's, acceptance thereof, the plaintiff should have the cheese on the terms proposed. On the next day the plaintiff sent one Nathan Lapham to the defendant for the purpose, and no other, of notifying the defendant that he, the plaintiff, would take the cheese on the terms proposed and to pay

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the defendant ten dollars, a part of the purchase money. Lapham gave the defendant notice accordingly, and offered him the ten dollars. [The defendant refused to take the money unless it was understood that the plaintiff should take, and pay for, the cheese by the middle of the week following. Lapham told the defendant that the plaintiff would do so, and that, if he did not, the ten dollars would be forfeited and belong to the defendant.] Whereupon the defendant took the ten dollars.

To the testimony offered by the defendant to prove the facts last above stated, and included in brackets, the plaintiff objected. The objection was overruled. This question is submitted to the court.

It further appeared that on the 26th day of November following, the plaintiff called on the defendant for the cheese, and informed him that he was ready to weigh and pay for it.

The defendant refused to let the plaintiff have the cheese, or to pay back the money paid him by Lapham, on the ground that the plaintiff had not come for it by the middle of the previous week and that the ten dollars were forfeited.

The cheese has never been delivered to the plaintiff or the ten dollars repaid. Lapham informed the plaintiff of his having given the notice and paid the ten dollars, as above stated, on the Wednesday following, but did not communicate to him the facts above stated in brackets. The plaintiff called for the cheese as soon as the circumstances of his business would permit after hearing from Lapham.

The defendant resided in Pawlet, Lapham in Danby, and the plaintiff in Jamaica. Lapham mailed his letter to the plaintiff, communicating to him that he, Lapham, had notified the defendant of the plaintiff's acceptance of the defendant's offer, and the payment of the ten dollars, which the plaintiff received on the Wednesday evening following. The defendant offered testimony tending to show that A. S. Whitcomb, on the next day after the defendant claimed the plaintiff was to have taken the cheese, went, at the plaintiff's request, to the defendant, and offered to pay the defendant one hundred dollars, and told the defendant that the plaintiff said he could not take the cheese that week but would come the Thursday following and take the cheese and make it all

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right. That the defendant refused to take the one hundred dollars, and gave as a reason that the time had expired for taking the cheese, but that if Whitcomb was agent enough to run the risk of the cheese taking hurt where it was, it could remain, and he, Train, would take the one hundred dollars. Whitcomb refused to take the responsibility for the plaintiff to run the risk and defendant refused to take the money. To this the plaintiff objected and the testimony was rejected.

The question of its admissibility is also submitted to the court."

The court at the December term 1860, KELLOGG, J., presiding, rendered judgment on the report for the defendant, to which the plaintiff excepted.

Butler & Wheeler and *E. B. Burton*, for the plaintiff.

J. B. Bromley and *D. E. Nicholson*, for the defendant.

PECK, J. This is an action of assumpsit in which the plaintiff claims to recover upon a special contract by which the defendant sold to the plaintiff, as is alleged, a quantity of cheese, about four thousand pounds, and claiming as a breach the non-delivery of the cheese. The declaration also contains the common count for money had and received. The case having been tried in the county court on the report of the referee who reported the facts and submitted the question of the legal liability of the defendant to the court, the county court rendered judgment for the defendant and the plaintiff excepted to that decision.

The principal questions in the case are, whether the facts reported by the referee constitute a binding contract between the parties, and if so, what that contract was.

It appears that the plaintiff called on the defendant November 10th, 1858, to buy the defendant's cheese, being about four thousand pounds then fit for market :—defendant offered it to plaintiff for eight and one-half cents per pound, to be delivered at the railroad depot, either at Granville, New York, or at Danby, Vermont, as plaintiff desired, the cheese to be weighed at defendant's

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house in Pawlet, and to be taken and paid for by the plaintiff, if he could, the following week, *or as soon thereafter as he could attend to it*. The plaintiff did not then accept the offer, but the defendant agreed that if the plaintiff should notify him the next day of his, the plaintiff's, acceptance thereof, the plaintiff should have the cheese on the terms proposed.

Thus far there was no contract; the plaintiff did not accept the offer; he therefore was not bound, and for that reason the defendant was not—it was a mere proposition which the defendant might recall at any time before an acceptance by the plaintiff, and it being for the sale of goods of the value of more than forty dollars, and evidenced by no writing, it required also either a part delivery or something given in earnest or in part payment to bind the bargain. There was no such delivery. But the plaintiff claims the contract became operative and binding by notice from the plaintiff that he accepted the offer and by the payment of ten dollars to the defendant, the next day after the plaintiff's proposition was made. On this point it appears that on the 11th November 1858, "the plaintiff sent one Lapham to the defendant for the purpose, and no other, of notifying the defendant that he, the plaintiff, would take the cheese on the terms proposed, and to pay the defendant ten dollars, a part of the purchase money." Lapham gave the defendant notice accordingly, and offered him the ten dollars. The defendant refused to take the money unless it was understood that the plaintiff should take and pay for the cheese by the middle of the week following. This was in effect a repudiation on the part of the defendant of his offer the day before, and a refusal to abide by it or to accept the ten dollars to bind the bargain or as part payment under it. This he had a legal right to do. Lapham then told the defendant that the plaintiff would do so, that is, take and pay for the cheese by the middle of the next week, whereupon the defendant took the ten dollars.

It is claimed on the part of the plaintiff that Lapham had no authority to deliver the money on any other terms than on the basis of the defendant's original offer, and no authority to enter into any new stipulations, and hence, as the defendant received the ten dollars, he must be taken in law to have received it under

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his original offer, and that such offer thereby became a binding contract. But concede this want of authority, and it only shows that no new contract has been made binding on the plaintiff. The fact still remains that the defendant has declined to abide by his original offer, and has not accepted the ten dollars under it. This is sufficient to prevent the original offer from ripening into a contract, whether the new stipulations entered into, and under which the money was received, are binding on the plaintiff or not.

It follows that the plaintiff cannot recover damages for the non-delivery of the cheese under a contract based on the original offer of the defendant made to the plaintiff on the tenth of November, for the reason that no such contract was ever made so as to become legally binding between the parties.

If the contract made between the defendant and Lapham was binding on the plaintiff, the plaintiff has no claim for damages under it, for the reason that he has never seasonably offered on his part to perform it, and the defendant is not shown to have been guilty of any breach of it, nor does the plaintiff seek to recover on this contract, but on the contrary repudiates it and denies the authority of Lapham to make such a contract in his behalf. But as the defendant claims to hold the ten dollars paid to him by Lapham, and the plaintiff seeks to recover it, it is material to determine the question as to the validity of this contract, as on this depends the right to the ten dollars. If this contract was valid and binding on the plaintiff, the defendant has a right to hold the ten dollars paid under it, as the plaintiff has neglected to perform it, and it was one of the stipulations of this contract that the ten dollars was to be forfeited if the plaintiff neglected to take and pay for the cheese by the time stipulated therefor.

Had Lapham any authority from the plaintiff to make such contract? He had none in fact, for the report finds he was sent by the plaintiff to notify the defendant that the plaintiff accepted the defendant's offer of the day before, and to pay the defendant ten dollars, part of the purchase price under that offer or contract, *and for no other purpose*. Had he any authority in law? It is true, an agent may bind his principal not only to the extent of his actual authority, but to the extent of his apparent

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authority within the general purpose of his agency, as in some cases where an agent is clothed with authority to make a contract and in negotiating the contract he violates some private instructions of his principal not known to the other party. But in this case Lapham had no authority to make any contract whatever, but was sent merely for the purpose of giving notice of the acceptance by the plaintiff of a previous offer by the defendant, and to pay the ten dollars in pursuance of it.

In this respect, therefore, the case differs from the case of *Barber v. Britton & Hall*, 26 Vt. 112, cited by the defendant's counsel. In that case the defendant sent the agent to employ the plaintiff, a physician, to visit on their credit a boy who had been injured in their employ, with instructions to tell the plaintiff they would pay him for the first visit. The agent employed the plaintiff generally to attend upon the boy, and omitted to inform him that the defendants would pay only for the first visit. It was held that the defendants must bear the loss resulting from the neglect of their agent. In that case the agent was authorized to make a contract; in the case before us the agent had no power to make a contract, and his act in doing so was foreign to his agency, and the defendant in contracting with him, took the risk of the principal's refusal to adopt the act of the agent. The case at bar is in principle much like *Jordon v. Norton*, 4 M. & Wels. 155, which was an action for the price of a mare: the parties had agreed on the price and on all the terms of the trade, except the plaintiff had proposed to warrant the mare sound and quiet in *double harness*; the defendant had offered to take her at the price if the plaintiff would warrant her sound *and quiet in harness*. The defendant sent his son after the mare with instructions not to take her without such warranty as he, the defendant, had required. The son took her without such warranty, and it was held that the taking of the mare by the son was no acceptance by the plaintiff for want of authority in the son. The mare having been returned, it was held that an action for the price could not be sustained.

White v. Laughlin, 30 Vt. 600, is a still stronger case in support of this view of the case, and goes further than is necessary to go in the present case.

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The result is, that the contract made by Lapham under which he paid the ten dollars, was not binding on the plaintiff for want of authority in Lapham to make it. But it is claimed that the plaintiff by bringing this suit has affirmed the contract made by Lapham. There is no doubt but a party may thus affirm a contract made by an agent, although the agent exceeded his authority, but the declaration has not been handed to the court, and there is nothing in the papers before us to show that the plaintiff has ever affirmed the contract made by Lapham, or that he has sought to recover except upon the original contract between him and the defendant, or to recover back the ten dollars paid by Lapham. There can be no recovery for damages for non-delivery of the cheese.

The testimony as to the defendant's offer through Whitcomb, was properly rejected by the referee, as it had no tendency to vary the rights of the parties.

The result is, that the defendant has ten dollars of the plaintiff's money which he has received without any consideration, and which he holds under no contract; not under the first offer of the defendant, for that never became a binding contract and the money was not received under it; not under the second contract made by Lapham, for that is not binding on the plaintiff. This sum the plaintiff is entitled to recover.

The judgment of the county court is therefore reversed and judgment rendered for the plaintiff for the ten dollars and interest thereon from the time from which the referee computes it to the present time.

LYMAN BOWEN v. LEMUEL KING, *apt.*

School Districts. Taxes. Evidence. Presumption.

A school district can raise money for building a school house or supporting a school only by vote of the district in a meeting legally warned. The prudential committee are only authorized by statute, to assess a tax on the list

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of the district "after the vote of the district for that purpose." Nor does the act of 1850 (Comp. Stat., Ch. 20, sec. 44, p. 149,) requiring districts to raise teachers' wages upon the grand list, authorize the prudential committee to assess a tax therefor without a vote of the district.

Although no statute existed in this state prior to the year 1808, by which inhabitants of different towns could be united in one school district by action of such towns, and therefore no presumption of law could be raised, in the absence of record evidence of the organization of such district, that it had been created prior to that year, by the action of such towns; yet such a district might, previous to that year, have been constituted by special act of the Legislature; and where such district had been in continued existence for more than twenty-five years prior to 1808, with the continued acquiescence of the towns out of which it was erected, as well as of the inhabitants of the district itself; *held*, that the original creation of the district by act of the Legislature might well be presumed.

And where portions of three towns had acted together as a union district for more than fifteen years subsequently to the act of 1808, (Slade's Statutes, 593, No. 2,) authorizing towns to form such districts, before any action was taken by the district or by the towns out of which it was formed, implying any doubt as to the perfect legality of the district, *held*, that this was sufficient to raise the presumption, in the absence of evidence as to the formation of the district, that it was legally created and organized by action of the constituent towns.

When a union district of this kind had existed more than fifteen years subsequently to the act of 1806, the district and one of its constituent towns, in which was the district school house, voted to accept into the district those portions of two other towns which had previously acted with, and been considered parts of the district; *held*, that this action could not be regarded as any evidence that the legal existence of the district was not already perfect, but was probably the result of over-caution, as there was no record evidence of the formation of the district; that although insufficient in itself to create a legal union district, it could not operate to destroy one already existing.

When such union district is once legally formed, it can only be dissolved by application to the county court under the statutes, (Comp. Stat. ch. 20, sec. 47, p. 150); neither of the towns out of which it is created can destroy it.

And *quere*, whether such districts are not entirely exempt from all control of the towns to alter their limits in any manner.

But where by vote of one of the towns a quantity of land in that town, owned by a person residing in another of the towns composing the district, was set off to the district; if the towns and the district for any considerable time assented to and acquiesced in this alteration, all parties would be bound by it.

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And if otherwise, the action of the town setting off the land to the district would be merely nugatory, and the land would become no part of the district.

A union district was composed of parts of three different towns, *Held*, that the relation to each other of these parts could not be such as is provided for by sec. 21, ch. 20, Comp. Stat., whereby a town may set one or more of its inhabitants to a district in an adjoining town, with the consent of such district; because the parts of the district embraced in two of the towns did not appear ever to have had, or claimed to have, any organization as districts themselves, so that persons of the third town could have been set to them under this statute; and on the other hand, the first mentioned two towns did not appear ever to have voted to set any of their inhabitants to the district in the third town, except a vote in one of those towns in 1851, after the union district had actually existed more than seventy years.

Held further, therefore, that the district in question being a union district composed of parts of different towns, one of these parts could not by its own action, or that of its town, dissolve the district, or act as a district by itself so as to elect legal officers or impose legal taxes.

The case was referred and the referee reported the following facts :

School district No. 1, in the town of Sunderland, and the persons owning or residing upon certain farms in the town of Manchester and one farm in the town of Sandgate, have all acted together and supported a school as one district, since about the year 1783. No records were kept in the district until the year 1805; since that time the district officers have been chosen in part from Manchester and Sandgate. The Manchester part of the district has been known as the Brownson district, but never had any organization except with Sunderland, and never chose officers or had a school house or school by themselves.

In 1829, sixty-six acres of land, which had been purchased in Manchester by a person then living in Sunderland, were added to the Brownson district by a vote of the town of Manchester.

There is no record of any action on the part of Sunderland, Manchester and Sandgate, creating a union district, except as hereafter stated. The district was organized at a meeting called by the selectmen of Sunderland on the 6th of November, 1805. There is no evidence of any prior organization. At the first annual meeting of the district after this organization, holden November 25th, 1806, a resident of Manchester was chosen mod-

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erator, and other Manchester men participated in the meeting; and the officers of the district have been elected from year to year since that time without reference to whether they resided in the Manchester, Sunderland or Sandgate part of the district. There has been a school house in the Sunderland part of the the district for more than seventy years.

On the 30th of December, 1827, the district voted to accept into it the inhabitants in that part of Manchester, commonly called the Brownson district, and also the person then living on the farm in Sandgate before referred to.

At a town meeting holden in Sunderland, March 17th, 1828, it was voted that so many residents of the town of Manchester as are desirous to be proprietors in school district No. 1, in Sunderland, should be annexed to that district, also the family residing on the farm in Sandgate above mentioned.

At a town meeting holden at Sandgate, March 4, 1851, the person then residing on said farm in that town was set off from district No. 5 in that town to a school district in Sunderland.

The Brownson district received its proportion of the public money in Manchester, which was distributed *per capita*, and the same was appropriated for the support of the school kept in the school house in Sunderland. Before 1827 the money was paid to a trustee, after that time to the clerk of district No. 1, in Sunderland. The first time it was paid to them properly as to a fractional district, was in 1844.

In 1856 the district in question built a new school house on the site of the old one, and two Manchester men with one Sunderland man were by a vote of the district, appointed a building committee. The district voted to accept the new school house, and raised a tax to pay for it in October, 1857. Those residing in Manchester attended and voted at this meeting. The majority of those residing in Sunderland voted against accepting the house and against the tax. A school has been kept in the new school house every season since it was accepted, to this time, and one winter it was occupied by the whole district. The men living in Manchester and Sandgate and a part of those living in Sunderland, have kept up the district organization by holding school meetings and electing officers.

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At a town meeting holden in Sunderland, March 2d, 1858, it was voted to exclude Manchester and Sandgate from district No. 1. At a school district meeting holden at the school house in district No. 1, in Sunderland, March 20th, 1858, for this, among other things, to vote to exclude all persons residing in Manchester and Sandgate from participating in the benefits of such district, it was voted to adjourn the meeting to the 2d Tuesday of September following. Those living in the Manchester part of the district attended and voted at this meeting, to which a majority of those residing in the Sunderland portion of the district objected, and voted against the adjournment.

March 29th, 1858, a school district meeting was warned to meet at the shop of one King in the Sunderland part of the district on the 5th day of April 1858, for the purpose, among other things, of voting to exclude certain persons residing in Manchester and Sandgate from the district; and at that meeting it was voted to exclude all such persons from the district. Those opposed to the object of this meeting only attended it for the purpose of objecting to its proceedings. At the adjourned meeting holden at the school house on the second Tuesday of September, 1858, it was voted to adjourn without day.

The defendant in this case, at the time of taking the property described in the plaintiff's declaration, was collector of school district No. 1, in Sunderland, having been elected, with the other officers of the district, March 29th, 1859. The property in question was taken by him by virtue of a tax bill certified by the prudential committee of district No. 1, in Sunderland, elected October 27th, 1858, and a warrant issued thereon, dated April 13th, 1859, by a justice of the peace in Sunderland, to satisfy a tax assessed against the plaintiff. The tax was made up on the grand list of 1858, and was in part for the teacher's wages; and those persons only were included who had been designated by the listers of Sunderland as residing in district No. 1. Those living in Manchester and Sandgate were not assessed in the tax and rate bill upon which the property in question was taken and sold by the defendant. There was no vote of the district assessing or ordering the tax in question.

Since the vote at the meeting held at King's shop, above men-

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tioned, to exclude those living in Manchester and Sandgate from the district, a majority of the legal voters, residing in the Sunderland part of the district, have kept up a school district organization by holding school meetings and electing officers, and it was by the latter that the defendant was elected collector, and through their officers that the tax in question was assessed.

If from the foregoing facts the court shall be of the opinion that the plaintiff should recover, the referee found that he should recover the sum of one dollar and fifty cents and his costs; otherwise, that the defendant should recover his costs.

Copies of certain records accompanying the report were referred to by the referee, but under the decision it is unnecessary to set them forth.

The county court, rendered judgment, upon the foregoing report, for the plaintiff; to which the defendant excepted.

H. Canfield, for the defendant.

A. L. Miner and *H. E. Miner*, for the plaintiff.

POLAND, CH. J. The proceedings under which the defendant seeks to justify taking the plaintiff's property are fatally defective, for the reason that the tax was never voted by the district. The statutes authorizing school districts to raise taxes for building school houses, and supporting schools, require them to be raised by vote in a meeting legally warned, and no other mode is provided; and the prudential committee are only authorized to assess a tax on the list of the district "*after the vote of the district for that purpose.*" This has always been understood to be a necessary requisite to a legal tax, and many cases are to be found in our reports where the form and sufficiency of the proceedings of the district in voting the tax have been considered and determined. *Brown v. Hoadley*, 12 Vt. 472; *Chandler v. Bradish*, 23 Vt. 416. Nor does the act of 1850, requiring districts to raise *teacher's wages* upon the grand list, authorize the committee to assess a tax therefor, without a vote of the district. The language of the act clearly contemplates a vote. "*All monies raised by school districts,*" etc. Districts can raise money

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only by vote. There seems no more reason for allowing a committee to assess a tax in such case without a vote, than in any other case, where there is a legal liability upon the district, which must eventually be satisfied by a tax upon the inhabitants of the district.

This point would be decisive of the present action, but another and more important question is presented by the case, and as the counsel have fully discussed, and the court considered it, we deem it proper to give our judgment upon it.

This tax was assessed only upon the inhabitants living in a particular territory, or district, wholly in Sunderland; and the defendant was appointed collector by a vote of the persons residing within that territory, treating that as a legal and separate school district, lying wholly in that town. The plaintiff claims that this territory was not a legal school district of Sunderland, but that it, together with contiguous territory in Manchester and Sandgate, constituted a legal union school district, which had never been legally dissolved.

The great question is, whether the facts reported by the referee are sufficient to show the existence of a union district, for if one ever did exist, it is clear that it has not been legally dissolved, for all the action for that purpose was on the part of the town of Sunderland, and of that part of the district lying in Sunderland, which would clearly be nugatory to produce any such result.

The referee reports, that the inhabitants of this territory or district in Sunderland, and the inhabitants living in certain contiguous territory in Manchester and Sandgate, have all acted together, and supported a school as one district for more than seventy years, and that since 1805, (the time when said district appears to have commenced keeping records,) the officers of the district have been selected from each of the three towns, thus acting in the district.

The records referred to by the referee in his report, do not show the formation of a union district by any sufficient action of the towns from which it was constituted, nor is this claimed on the part of the plaintiff.

What is claimed by the plaintiff is, that from the long period

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that the inhabitants of this territory acted together, in the character and capacity of a union school district, exercising all the rights and privileges, and performing the duties thereof, with the acquiescence of the respective towns, the legal erection of such territory into a district, and its proper organization, is to be presumed; but that after so great a lapse of time, it cannot now be shown.

It has been settled by repeated decisions in this state, beginning with *Barnes v. Barnes*, 6 Vt. 393, and coming down to *Bull v. Griffith*, 30 Vt. 273, that the legal existence and organization of ordinary school districts will be presumed after a long continued maintenance of such organization, and exercise of the functions of such district; although the records of both town and district, wholly fail to show its creation or organization. The defendant claims that the doctrine of these cases cannot be applied to the present; that prior to 1808, no presumption can be made in favor of the legal existence of a union school district, because no power or law then existed, by which one could in any manner be created. If this claim is well founded in fact, it is certainly a full answer to any presumption in favor of such district prior to that time. It would be like claiming a presumption of a deed, or grant, from long occupation, when no person existed who could make a deed or grant. But is it true no such power existed? No statute by which the towns could create a union district existed in this state until 1808, and therefore no presumption can be made that it was done by action of the towns. But it is insisted by the plaintiff that such a district might have been constituted by a special act of the legislature, and that such an act should be presumed.

In *Pierce v. Whitman*, 23 Vt. 626, it appears, that such a district was created by a special act, in the towns of Hartford and Pomfret, and the legal power of the legislature to pass such an act is not questioned by court or counsel. We are unable to see any good ground of objection to such creation of a mere municipal corporation by the legislature, where no general law existed by which the towns were empowered to create them. We understand the doctrine of presumption as applied to school districts, to be founded upon the same general principles and policy, as the

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presumption in favor of grants, deeds, etc., the great improbability that a state of things entirely inconsistent with the present existence of such an instrument, should be allowed to continue, and be quietly acquiesced in for a long period of time. In favor of long continued user and possession, courts have said they would presume everything. Acts of parliament, grants from the crown, surrenders of charters, and many other things, have been presumed. This district appears to have been in continued existence and action, for more than twenty-five years before 1808, and we may well presume that it was formed by an act of the legislature. The continued acquiescence of not only the inhabitants of the district, but of all the three towns, cannot be otherwise rationally accounted for. But even if it were necessary that the presumption should be made after the act of 1808, authorizing towns to form union districts, there seems ample room to sustain it. There does not appear to have been any action by the district, or by either of the towns, implying any doubt as to the perfect legality of the district until 1827, or 1828, when the district, and the town of Sunderland, voted to accept into the district, that part of Manchester and Sandgate which had previously acted with, and been considered a part of, the district. This action of the district and the town, we cannot regard as any particular evidence that the legal existence of the district was not already perfect, but as no record evidence of it existed, this probably was, from over caution, regarded as a measure of safety; and though insufficient of itself to make a legal union district, it could not operate to destroy one already existing. It has never been suggested that a longer period than fifteen years continued action as a district was necessary, to raise the legal presumption in its favor, in accordance with the general rule of prescription in this country; and much more than that period had elapsed after 1808, before this attempted action of the town and district.

The report shows that in 1829, sixty-six acres of land in Manchester, owned by a man in Sunderland, was set to this district by vote of the town of Manchester. It is urged that this shows, that this could not have then been regarded as a union district, because if so, neither town alone, could alter its limits, by adding to, or taking from, its territory.

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It has always been understood to be clear, that when a union district was once legally formed, neither town could destroy it; that such district could only be dissolved, in the manner provided by the statute, by application to the county court.

But it has been a vexed question, whether such districts were entirely exempt from all control of the towns, to alter their limits merely, as convenience might require.

In *Pierce v. Whitman*, cited above, REDFIELD, J., intimates his own opinion, that the towns might thus alter the lines of the district, though they had no power to dissolve it. It seems difficult, however, on any principle, to see how the town could interfere at all, unless they had full power over the whole, within the town. This question has been before the court on several occasions within a few years, but I am not aware that it has ever been distinctly settled.

However this might be, if territory was thus added, and the town, and the district for any considerable time, assented to the alteration, and acquiesced in it, all parties would be bound by it. This is decided by the case of *Pierce v. Whitman*. At the very worst, however, this action of Manchester would be merely nugatory, and the sixty-six acres would not become part of the district. It is also insisted by the defendant, that if there is enough in the case to show any legal connection at all as a district, between these fragments of different towns, it was not a proper union district, but only such a case as is provided for by the 21st sec. of chap. 20, where a town may set one or more persons to a district in an adjoining town, with the consent of such district. But from the records in the case, it does not appear that any such relation as this was ever legally contracted. The Manchester and Sandgate parts of the district, do not appear to have ever had, or claimed to have, organization as districts, so that the Sunderland part could be set to them, under the statutes. It must have been formed then, by setting the Manchester and Sandgate parts to the district in Sunderland. But there does not appear to have ever been any vote on the subject by the town of Manchester at all, and none in Sandgate till 1851, when the district had actually existed nearly seventy years.

The case then is left to stand upon the proper presumption to

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be raised from this long period of connected and harmonious action together, as a school district, and we are all of opinion, that it points to a fixed and permanent union district, indissoluble except in the mode pointed out by statute, rather than to the mere temporary arrangement provided for by the 21st sec., which either party may dissolve at pleasure. This being so, one part of the district could not by its own action, or that of the town, dissolve it, and the action of a mere fraction, claiming to be a district, was illegal and void; they could not elect legal officers, or impose legal taxes.

The judgment is affirmed.

AUSTIN P. GRAHAM v. H. B. STEVENS.*Mortgage. Agreement. Deed.*

The defendant, with his wife, executed to the plaintiff a deed conveying to him, by its terms, certain real estate; but continued to hold possession of the premises. Upon the back of the deed, and prior to its execution and delivery, was endorsed an agreement, signed by the plaintiff, but not sealed, witnessed or acknowledged, whereby it was agreed in substance, that if the defendant should within five years from the date thereof pay to the plaintiff a certain sum of money therein named, (which was the same substantially as the consideration named in the deed, and was less than the admitted value of the premises,) "together with the use" of the premises conveyed by the deed, then the plaintiff should make and execute to the defendant a good and sufficient deed of the premises in question; *held*, that the deed and agreement endorsed upon it together constituted a mortgage, and that the defendant was therefore entitled to the possession of the premises until the condition of the agreement was broken.

No other written evidence of a debt than that furnished by the instrument itself is necessary to sustain a mortgage.

EJECTMENT for a certain tract of land situate in the town of Winhall. Plea, not guilty, and trial by the court at the June term, 1860, KELLOGG, J., presiding.

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The plaintiff read in evidence on the trial a deed executed by the defendant and his wife to him, the plaintiff, dated June 4th, 1857, and conveying in consideration of the sum of eight hundred and fifty dollars, the premises described in the plaintiff's declaration in this action. It was admitted by the defendant that at the time of the commencement of this suit, he was, and for a year previous thereto had been, in possession of the premises in question.

A written agreement was endorsed upon the deed, of which the following is a copy :

"Memorandum of agreement made and entered into between A. P. Graham of the town of Manchester, and H. B. Stevens of the town of Winhall, county of Bennington, state of Vermont, is as follows, to wit : That if the said H. B. Stevens, or his heirs or assigns, or executors, or administrators, or any of them, within five years from this date cause to be paid or pay the above named A. P. Graham, his heirs, executors, administrators or assigns, the full sum of eight hundred and fifty-one dollars, good and lawful money of the United States, together with the use of said farm, then the above named A. P. Graham shall make and execute to the above named H. B. Stevens, a good and sufficient deed of the within named farm."

Signed,

"A. P. GRAHAM."

The plaintiff admitted that this agreement was signed by him before the execution and delivery of the deed above mentioned, upon which it was endorsed ; and that the premises in question were worth one thousand dollars.

The county court decided that under the deed, the plaintiff was entitled to the possession of the premises at the time of the commencement of this suit, notwithstanding the contract or agreement endorsed on the deed, and rendered judgment for the plaintiff ; to which decision and judgment the defendant excepted.

A. L. Miner and H. E. Miner for the defendant.

Butler & Wheeler, for the plaintiff.

PIERPOINT, J. The determination of this case depends upon the construction that is to be given to the deed executed by the

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defendant and his wife to the plaintiff, in connection with the writing upon the back thereof, signed by the plaintiff.

The case shows that the said writing was signed by the plaintiff before the deed was executed and delivered by the defendant, so that their legal effect and operation were simultaneous, and they must be regarded, as they in fact were, one and the same transaction, and constitute in reality, but a single instrument. Regarding it in that light, what is the legal effect of the whole taken together? The deed is executed by the defendant upon the express stipulation on the part of the plaintiff, that the premises shall be reconveyed on the payment of a stipulated sum of money, at the expiration of a specified time. If the substance of this stipulation had been embraced in the body of the deed in the form of a condition that the deed should be void, or the premises reconveyed on the payment of such sum of money, there could be no question that the instrument would have been a mortgage. If the grantee accepts the deed he takes it subject to such condition. If this stipulation had been inserted in the body of the deed and the deed then signed by both parties, the result would have been the same. It would then only have expressed in terms the legal operation of a strict mortgage, the only difference would be in the mode of revesting the title. In the one case, the payment of the money or discharge of the mortgage would be sufficient, in the other a deed would be necessary.

Instruments of this character are always to be construed according to the intentions of the parties, to be derived from the instrument itself. Now we think it is perfectly apparent that this instrument was executed by the one, and accepted by the other, subject to the condition written upon the back of it, and that it was intended to be a mortgage to secure the payment of the said sum of eight hundred and fifty-one dollars, and such we think, is its true legal effect, and that it should receive the same construction that would be given to it, if the condition was inserted in the body of the deed.

The conduct of the parties tends to show that such was their understanding. The fact that the grantor remains in possession is always regarded as a strong circumstance tending to show that the deed is a mortgage.

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But it is said this instrument cannot be regarded as a mortgage, as there was no debt existing on the part of the grantor to be secured by it. There is nothing in this case to show that there was no such debt, but on the other hand, the only inference to be drawn from the paper itself, is that there was such a debt. There may be no other written evidence of a debt than that furnished by the deed, but all the authorities agree, that none is necessary to sustain a mortgage. Kent, in his commentaries, vol. 4, page 145, says that "the absence of any bond or covenant to pay the money will not make the instrument less effectual as a mortgage."

That this instrument would, in a court of chancery, be regarded as a mortgage on its face, there can be no doubt, and we think it equally clear that such is its fair legal construction. This being the case, by our statute the grantor is entitled to the possession until the condition is broken; and as the case shows that the condition had not been broken at the time this suit was commenced, the action cannot be maintained.

Judgment of the county court is reversed and judgment entered for the defendant.

C. J. HURD v. THOMAS FLEMING.*Trespass. Conditional Sale.*

To entitle a plaintiff to maintain trespass for personal property he must have at the time the property is taken by the defendant, either the actual possession of it, or title to it, with the right of present possession.

When property was sold by a conditional sale and the time of payment for the same by the vendee had not elapsed, and while in the possession of the vendee it was attached by one of his creditors, it was held that although the vendor continued the general owner of the property, yet not having the right of present possession, he could not maintain trespass for the property against the attaching creditor of the vendee.

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TRESPASS for taking and driving away seventy sheep. Plea, not guilty, trial by jury.

It appeared that the plaintiff sold and delivered the sheep in question to Crawford Woodward, and took his note for the same on the 23d day of September, A. D. 1856, with a further agreement as follows:

“Received, Sandgate, Sept. 23d, 1856, of C. J. Hurd, seventy sheep, which I am to keep in good condition, provided I pay said Hurd one hundred and ninety dollars with use, on or before the first day of July next, meaning at shearing time, the said sheep are to become mine, otherwise they are to remain said Hurd's at all times and places.”

Signed,

“CRAWFORD WOODWARD.”

It further appeared that about the middle of October, 1856, while the sheep were in Woodward's possession, the defendant, being a creditor of Crawford Woodward, attached the sheep as his property, and drove them away. This action was brought to recover the value of said sheep. Upon these facts the defendant insisted that trespass would not lie. The court KELLOGG, J., presiding, ruled otherwise, and the defendant excepted.

H. Canfield, for the defendant.

A. L. Miner and *H. E. Miner*, for the plaintiff.

POLAND, Ch. J. The law is well settled that to entitle a plaintiff to maintain trespass for personal property, he must have at the time the property is taken by the defendant, either the actual possession of it, or title to it, and the right of present possession. At the time the sheep were taken by the defendant in this case, the plaintiff had not the actual possession of them; they were in the possession of Woodward, under the contract of conditional sale from the plaintiff to him.

It is not questioned but that the plaintiff was the general owner at the time, and the right of the owner of personal property to make such conditional sale, and retain the general property in himself until the conditional vendee pays the price, has

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been established in this state, ever since the case of *West v. Bolton*, 4 Vt. 558. But the defendant claims that by the proper construction of the written contract, Woodward was entitled to the possession of the sheep, until the time arrived for making payment, and that therefore trespass cannot be maintained against the defendant for taking them before that time.

Upon inspection of that contract, we are satisfied that such is its true meaning, and construction. The writing expressly provides that Woodward is to keep the sheep, and the general purpose and object of the contract could not be fulfilled, except by his having the possession of them. Such is the general expectation, and uniform course of practice in all such conditional sales of property.

The words of the contract "otherwise they are to remain said Hurd's at all times and places," mean no more than this: that the sheep are to be his, until the contract is performed by paying the one hundred and ninety dollars.

But the general owner may so part with his right to the possession of his property, as not to be able to maintain the action of trespass, for an unlawful taking of it, though his general title remains unimpaired. The law gives him an action for the injury thus done him, but as trespass lies only for an injury to the possession, he cannot maintain it. In the charge to the jury they were told the plaintiff was entitled to recover if they should find that at the time of taking and driving away the sheep, he was the general owner and had either the actual possession, or the right to immediate possession. But we understand from the whole case, that there was no evidence outside the written contract, to show that the plaintiff was entitled to the possession; so far as there was any evidence, it entirely supported and upheld the construction we give to it. The sheep were actually delivered over under the contract, and it was arranged with the knowledge of the plaintiff, that they were to be kept on the farm where Woodward lived. It cannot, therefore, be treated as if there was any evidence in the case to which that part of the charge could properly apply, or from which the jury could have found that the plaintiff was entitled to immediate possession. It all stood upon the contract, and as already stated,

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we think that gave the right of possession to Woodward. But the plaintiff insists that under the decisions in this state he can maintain the action for the taking by the defendant, though he was not entitled to the possession as against Woodward.

In most of the cases in our reports of actions brought by conditional vendors, the time had expired and the condition was broken before the taking, so this question did not rise. But there are some cases where it has arisen. In *Bigelow v. Huntley*, 8 Vt. 151, the plaintiff was such a conditional vendor, and it was conceded that the vendee was by the contract entitled to possession till the time of payment expired, and the property was attached before that arrived. The court were divided, but a majority held that the plaintiff could recover, but the judgment was put principally on the ground, that the property had been previously attached by another creditor, and the plaintiff had receipted it to the officer, and could recover against the last officer, upon his title as receiptor to the first. The action in that case was trover and not trespass.

Swift v. Moseley et al., 10 Vt. 208, and *Grant v. King et al.*, 14 Vt. 367, are very similar in principle. The plaintiffs had leased personal property for a certain period, and the lessees, during the term had wrongfully sold the property, and in one case the plaintiff sued the tenant and purchaser together, and in the other the purchaser alone, in trover for the conversion of the property. The plaintiffs were allowed to recover in both cases, upon the ground that the tenant by such tortious sale, had put an end to his right as lessee, and forfeited all right to claim to hold the property against his landlord, and the landlord's right to the possession immediately reverted.

But these cases we think, do not apply here. Woodward was guilty of no wrongful act, by which he forfeited any right he had under the contract, and he was just as well entitled to an action against the defendant for taking the property away from him, as was the plaintiff for the injury to his reversionary right. In short we have not been able to take this case out of the general rule, that one who has by contract parted with his right to the possession of personal property for a term, cannot

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sustain trespass against one who takes it away from the person in possession, during the term. This disposition of this question renders it unnecessary to examine the other points argued.

Judgment reversed and case remanded.

JAMES E. ROOT v. WM. D. COLLINS *et als.*

Chancery. Mortgage. Marshalling. Notice.

When premises incumbered by mortgage are sold by the mortgagor in separate parcels to several purchasers, as between the purchasers the several parcels shall be charged with the burden of the mortgage in the inverse order of the time of alienation.

A parol sale of a part of mortgaged premises, followed by possession and improvements on the same by the vendee, is sufficient, as between the vendee and the mortgagor and those claiming under him, having actual notice of the parol sale, to throw the burden of the mortgage upon the part of the premises retained by the mortgagor.

And when a purchaser of the part of the premises retained by the mortgagor had no notice of the parol sale of the other part, but he purchased it as agent and held it in trust for another person who did have actual notice at the time of the purchase, *held*, that the notice was sufficient and that the part so purchased subsequent to the parol sale of the other part, should be charged with the whole mortgage.

This was a bill to compel contribution towards a mortgage covering lands owned both by the orator and the defendant. The facts sufficiently appear in the opinion of the court. The chancellor dismissed the bill, from which decree the orator appealed. .

G. W. Harmon, for the orator.

N. B. Hall, for the defendant.

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PIERPOINT, J. The pleadings and evidence in this case unquestionably call for the application of the rule, that when premises that are subject to a mortgage, are sold by the mortgagor in separate parcels to several purchasers, as between such purchasers the several parcels shall be charged with the burden of such mortgage, in the inverse order of the time of alienation. This rule was fully considered in the case of *Lyman v. Lyman & Briggs*, 32 Vt. 79, and was then for the first time in this state judicially recognized as law. It may now be regarded as the settled rule in this state. Indeed no question is made as to its soundness, or its applicability, each party insisting upon the benefits of its application in their favor, upon the facts as they claim them to be established by the proof.

The proof shows that on the 2d of April 1849, Lucius H. Barber was the owner of the entire premises, in relation to which the questions in this case arise; and that on that day he mortgaged the whole premises first to one Loomis, and then to Benj. F. Jacobs.

In 1850, Barber sold the north part of the premises by a verbal contract to Jno. S. Robinson, who agreed to pay the Jacobs mortgage as the consideration for the part purchased. No deed was ever executed by Barber to Robinson, but Robinson immediately went into possession of the land purchased by him, plowed and sowed the land, cut the grass, and made preparation for erecting a building thereon, by digging a cellar, and drawing on lumber and stone for that purpose. Robinson also paid interest for one or more years on the Jacobs mortgage, and continued in possession until the 22d of November 1852, when he quitclaimed his interest in said north half to Elihu H. Field, who agreed to pay the Jacobs mortgage. Field immediately went into possession, erected buildings thereon, paid the Jacobs mortgage, and continued the possession until he sold out to the defendant Collins.

On the first of March 1853, Barber conveyed the north part to Field in pursuance to the agreement between Robinson and himself, and between Robinson and Field. On the 21st day of April 1858, Field conveyed the same land to the defendant Collins, who subsequently sold it to the defendant Colvin.

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As to the south part of said premises, it appears that on the 16th of July, 1852, Barber mortgaged the south part to Truman Huling, who, when he took his mortgage, had full knowledge of the contract between Barber and Robinson.

On the 22d of December, 1852, Barber sold and conveyed said south part to Leland Fairbanks, Jr., and on the 23d of March, 1855, Fairbanks conveyed the same to the orator.

On the 4th of December, 1854, Huling obtained a decree of foreclosure of his mortgage upon the south half of the land, and on the 1st of June, 1855, he assigned his decree and the premises to Jno. B. Gale, the partner of Fairbanks. This conveyance was made to Gale at the request of Fairbanks, and in pursuance of a contract for the purchase made by Fairbanks with Huling, and Fairbanks furnished the money to pay for it. On the 5th of June, 1855, Gale conveyed the same land to the orator.

On the 23d day of December, 1856, Loomis obtained a decree of foreclosure on his mortgage, covering the whole premises, against the orator and others; and the orator redeemed, and has brought this bill to compel the defendants to refund to him the money he paid for such purpose, or such proportion thereof as shall be adjudged equitable.

From this general statement it is apparent that the principal questions on which the case depends must arise upon the facts as they shall be found to exist, in relation to the verbal contract between Barber and Robinson, as to the sale of the north half, and the knowledge thereof by those who subsequently purchased the south half, and the effect that is to be given thereto between the parties to this bill. The contract between Barber and Robinson, being a parol one, was, of course, wholly inoperative under the statute. But Barber surrendered the possession to Robinson under that contract, and Robinson took and continued the possession, exercising acts of ownership, claiming title to it, making preparation for the erection of buildings, and paying a part of the consideration agreed to be paid. This we think constituted such a part performance of the contract that a court of equity would, as between those parties, have decreed and compelled a specific performance of it. If so then it is equally clear that Robinson would have had the right in equity, to insist, as

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between himself and Barber, that the south half of the premises should bear the burden of the Loomis mortgage.

Such being the right of Robinson, any third party who should purchase the south half of Barber, with a knowledge of the equities between him and Robinson would stand in no better position than Barber.

That Huling had full knowledge on this point, when he took his mortgage, is conceded. From all the testimony, we are satisfied that at the time Fairbanks took his deed from Barber, he was informed by Barber of the true state of the transaction between himself and Robinson and Field. Barber expressly swears that such was the fact, and although Fairbanks says he did not have such information until a subsequent period, we think he is mistaken as to the time when Barber first communicated the facts to him, and that he purchased with actual knowledge of the true state of the equities then existing between Barber Robinson and Field.

These facts dispose of all the questions that have been discussed as to constructive notice, so far as these persons are concerned. But there is no satisfactory evidence to show that Gale, at the time he took the assignment of Huling's interest, or that the orator, at the time he took his deed from Fairbanks, or when he took his deed from Gale, had actual notice of the equitable rights of Robinson or Field. It therefore becomes important to inquire into the position which the orator actually occupies in relation to the property, and to ascertain what interest he has in it, and what, in view of the whole transaction, his equitable rights really are.

The transfer of Huling's interest to Gale, the partner of Fairbanks, and from Gale to the orator, must in equity be regarded as the act of Fairbanks, and have the same effect as though the title had passed through him instead of Gale. It appears from the testimony of the three, that Fairbanks made the contract for the purchase with Huling, furnished the money to pay for it, directed the transfer to Gale, and three days thereafter directed Gale to transfer it to the orator, which he did. No consideration passed from or to Gale in the transaction. He was the mere instrument through which Fairbanks transferred the right

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from Huling to the orator, and Gale's name seems to have been used for no apparent reason except that Fairbanks' connection with the transaction might not appear on the face of the papers.

How then stands the orator as between himself and Fairbanks? Is he to be regarded as a *bona fide* purchaser of the property, for value, or merely as the holder of the legal title, as the friend and agent, and for the benefit of Fairbanks. From his own testimony, we find it difficult to resist the conclusion that he has never regarded himself as the real owner of the property. He states that he entertains a strong friendship for Fairbanks, who asked him to take this property, and that he purchased it, not because he wanted it, but solely because Fairbanks wished him to buy it; that he knew nothing about the property before, and took no pains to ascertain its value, or locality. He seems to have taken little or no interest in it since. He says that this proceeding was instituted without his consent or knowledge, and is prosecuted not for his benefit, but that he expects to be indemnified against all losses resulting from it. From other testimony it appears that Fairbanks was the active party in commencing and conducting the suit, and from all the testimony we are satisfied he is the real party in interest, and the only one that would be benefited by a decree for the orator, and that the property was transferred to the orator in the hope, that by a suit in his name, the effect of Fairbanks' knowledge of the true state of the equities between all the persons interested, might be avoided, and a decree obtained in favor of the orator, compelling the defendants to pay the Loomis mortgage, or lose part of the premises, when such a decree as between Fairbanks and the defendants would be clearly inequitable.

In this view of the case, without stopping to examine the circumstances tending to show constructive notice to the orator of the state of the equities we are clearly of the opinion that the decree of the chancellor dismissing the bill should be affirmed, and the case remanded.

CASES
ARGUED AND DETERMINED
IN THE
SUPREME COURT
OF THE
STATE OF VERMONT,
FOR THE
COUNTY OF WINDHAM,
AT THE
FEBRUARY TERM, 1861.

PRESENT:
HON. ASA O. ALDIS,
HON. JOHN PIERPOINT,
HON. LOYAL C. KELLOGG,
HON. ASAHIEL PECK, } ASSISTANT JUDGES.

G. W. & H. P. DODGE, v. SMITH & WAITE.

Principal and agent. Payment. Remittance.

The defendants being commission merchants in Massachusetts, and having in their hands produce belonging to the plaintiffs, who resided in Vermont, to sell for them, the plaintiffs gave a single special order in respect to a remittance of part of the avails of such sale to them in a particular way. *Held,*

Dodge et al. v. Waite et al.

that this did not authorize a remittance by the defendants at the risk of the plaintiffs of the balance of the funds in the same way, and that in the absence of any express authority such remittance was at the risk of the defendants.

BOOK ACCOUNT. The auditor reported that the plaintiffs were partners in business, residing at Loudonderry, in this State, and that the defendants were partners under the name of Smith & Waite, doing business at Lowell, Mass., as produce and commission merchants; that the account exhibited by the plaintiffs was correct, and that on the 23d day of March, 1855, there was a balance due from the defendants to the plaintiffs of \$44.71.

He further reported that the plaintiffs had consigned the produce named in their account to the defendants to be sold on commission, and that about the time the same was received by the defendants, George W. Dodge, one of the plaintiffs, was at Lowell and received part payment therefor, and then directed the defendants to send \$150 more to the plaintiffs, through L. P. Waite & Co., a firm doing business at Weston in this State; that after the \$150 had been sent as directed, and when the produce had all been sold there was a balance of \$44.71 due from the defendants to the plaintiffs; that this balance was due at Lowell and that the plaintiffs expected to pay the expense of sending the same to them, and that they knew it was the custom of Smith & Waite to remit money to their customers in this section of the country through L. P. Waite & Co.; that it was the custom of Smith & Waite to do up the money intended for each person in separate bundles, marked with the name of the person for whom it was intended and then enclose the whole to L. P. Waite;—that this balance of \$44.71 was sent by Smith & Waite to L. P. Waite for the plaintiffs by express March 23, 1855, and was received by L. P. Waite, but had never been paid over to the plaintiffs; that in April, 1855, Smith & Waite, informed the plaintiffs by letter that such balance had been sent L. P. Waite for them, and that the plaintiffs at several times afterwards called upon L. P. Waite, and claimed that he should pay or account to them for the same.

The court rendered judgment on the auditor's report for the defendants to which the plaintiffs excepted.

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Stoughton & Grant, for the plaintiffs.

Butler & Wheeler, for the defendants.

ALDIS J.—Smith & Waite, commission merchants at Lowell, Mass., had \$44.71 of the plaintiffs' money in their hands—payable to the plaintiffs at Lowell. They sent it by express to L. P. Waite & Co., in a package directed to the plaintiffs. L. P. Waite received the package but has not paid the money to the plaintiffs, though they have called for the same. The question that arises in the case is, whether such remittance of the money by the defendants was authorized by the plaintiffs, or can upon the facts in the case be regarded as a remittance at the plaintiffs' risk by which the defendants are discharged from liability.

There was no express order or authority from the plaintiffs to the defendants to remit the money. Can one be implied?

The plaintiffs had previously directed the defendants to remit to them \$150 (a part of the avails of their produce sold by the defendants,) through L. P. Waite & Co., and they had so done. Did this confer an authority, or was it an act from which an order might be implied that the balance of the sales of the same cargo of produce should be sent in the same way? We think not. The single special order as to the remittance of one sum could not be extended to any other. The plaintiffs might wish the balance to remain at Lowell, or to be remitted to some other place. Without further correspondence the defendants had no right to infer that the plaintiffs wished to have the balance remitted at their risk as the \$150 had been.

"The plaintiffs expected to pay the expense of sending the balance to them." But it does not appear that they expected that any particular mode of remittance was to be adopted;—or even that the money should be remitted to them. They must of course have expected to be at the expense of remitting funds due at Lowell to Vermont if they were remitted. But their expectations were not communicated to the defendants so that they could have acted in reliance upon them.

"The plaintiffs knew it was the custom of Smith & Waite to send money to their customers in Vermont, through L. P. Waite."

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The knowledge of such a custom did not bind them to receive their money in that way and at their own risk, unless they said or did something to authorize the defendants to understand that they were willing to have their moneys sent in that way. If a previous usage between these parties to have the plaintiff's moneys remitted in this way had been shown, that would be ground for infering that they understood that their general usage should be followed in this case. But no such usage is shown. The custom of the defendants could not establish a usage of trade by which the plaintiffs would be bound. Again, how vague is this alleged custom of the defendants? It is not said *at whose risk*, by this custom the moneys were sent,—or at whose expense,—or that the plaintiffs had any knowledge on these points.

So notice to the plaintiffs, that the moneys had been sent did not bind the plaintiffs to an assent that the remittance should be at their risk and operate as payment,—nor did the subsequent demand upon L. P. Waite to pay over the funds he had received, imply that if not paid over the plaintiffs should not look to the defendants for their money.

None of these facts, which are relied on by the defendants, show any authority, express or implied, that the remittance might be made as it was ;—or any subsequent assent to it, so as to discharge the defendants from liability. The act of the defendants in sending the money must be regarded as a mere volunteer act on their part—without authority, and therefore not operating to release them from their liability to the plaintiffs.

Judgment reversed, and judgment for the plaintiffs upon the report with added interests and costs.

L. P. WAITE & Co. v. H. P. & G. W. DODGE.

Partnership. Joinder of Parties. Pleading.

A dormant partner need not be joined in a suit in favor of the firm against their debtor.

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A partner whose name is not known or used in the business of the firm, is a dormant partner.

An ostensible though nominal partner, having no interest in the firm, may yet be joined in a suit in favor of such firm.

BOOK ACCOUNT. Among other things the auditor reported as follows :

“ I find that the plaintiffs were partners under the firm of L. P. Waite & Co., doing business at Weston in this State, and that from the spring of 1853, before any of the items of said account accrued, up to July, 1854, one A. W. Pierce was also a partner in the said firm of L. P. Waite & Co., that he assisted in the store of the firm in buying and selling goods and produce, but that his name was not used or known in the business of the firm. I also find that A. L. Waite, one of the plaintiffs, ceased to have any actual interest in said partnership, about the same time Pierce left the firm, July, 1854, but that the business was afterwards carried on at the same place by L. P. Waite, under the name of L. P. Waite & Co., and no notice was given to the defendants or the public of any change in said firm.

Items of plaintiffs' account amounting to \$237.09, and of defendants' account amounting to \$235.08, accrued during the time Pierce was a member of the firm of L. P. Waite & Co.

Stoughton & Grant, for the defendants.

Butler & Wheeler, for the plaintiffs.

ALDIS J. The defendants claim that the plaintiffs can not recover any portion of their accounts, because A. W. Pierce was an active partner of the plaintiffs' firm when the first part of the account accrued, and should have been joined in a suit on that portion of the account ; and that A. L. Waite, one of the plaintiffs, was not a partner when the rest of the account accrued, and therefore that a suit for that part of the account should be in the name of L. P. Waite alone.

1. We think A. W. Pierce is to be regarded as a dormant partner. “ His name was not known or used in the business of

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the firm." This we think means more than that his name did not appear in the firm,—it is that his name was not known in the *business* of the firm. He may have aided in doing the business of the firm and yet not have been known as a partner, but only as a clerk or agent. If a dormant partner, the suit as to so much of their account as accrued while he was partner is well brought. The balance due on such portion of the account to the plaintiffs appears from the report to be two dollars and one cent. The plaintiff's account being \$237.09, and the defendant's \$235.08.

The remainder of the account appears to have accrued after both Pierce and A. L. Waite left the firm. Pierce was a dormant partner, but it would appear from the report, though it is not very clearly stated, that A. L. Waite was an actual, ostensible and known partner in the firm and that he remained as a nominal partner after he had actually retired from the firm. If he is to be treated as a nominal and ostensible partner when the last part of the account accrued, we think the action properly brought in his name,—though he has no interest in the account. It was once a matter of much doubt whether such a partner *must* not be joined. 1 Chitty's Pleadings, p. 12. 2 Campb. 302.

More recent decisions have established the doctrine that he need not be joined in the suit. 10 B & C. 20. 1 C. & P. 89. 1 Ch. Pl. 12. That he should be joined at all, having no real interest, would seem to be inconsistent with legal principle. But the alleged reason for joining him seems to be, that being a nominal partner the contract is nominally, and in the contemplation of law, made with him as one of the firm. The principle is recognized in 9 Vt. 109, *Lapham v. Green*.

It would seem therefore that there was no fatal misjoinder in bringing the suit in the names of A. L. Waite and L. P. Waite as partners,—and that the balance of the account may be recovered in the names of the plaintiffs.

The judgment of the County Court, therefore, should be reversed and judgment for the plaintiff to recover the sum of \$53.92, being the balance found due the plaintiffs on account, (omitting the sum of \$14.71,) with added interest and costs.

Judgment reversed.

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TOWN OF NEWFANE v. TOWN OF DUMMERSTON.

Pauper. Grand List.

An actual commitment to jail is sufficient to cast the duty of providing for the relief of an imprisoned pauper, who stands in need of such relief, on the jailor and on the overseer of the town where the jail is situated, after proper notice has been given agreeably to the statute, and this duty is in no way dependent upon the regularity of the process on which he is committed.

A settlement in a town having been established, the legal presumption is until the contrary is shown, that it continues there.

Under the pauper act of 1817, residence is computed only from the time of registry.

Under the pauper act of 1823, no residence prior to that time, without registry, can be included to make a future settlement.

Where a person leased a farm to carry on at the halves, and the same was put in the list to himself and the lessor jointly, held that such person did not hold the land in his "own right" so as to give him a settlement under the pauper act of 1817.

ASSUMPSIT to recover for money expended in support of George Bemis, a pauper, confined in the county jail at Newfane. Plea, the general issue and trial by jury.

It appeared that Bemis was confined in close jail, at the time the support was afforded, by virtue of a mittimus, which was read without objection, except as to the legality of the commitment, as therein described, and consequent detention. This objection, which becomes immaterial under the decision of the Court, was overruled by the court, to which the defendant excepted. The defendant claimed that such commitment would not constitute such a confinement as would justify the plaintiffs in furnishing support. No question was made but that Bemis was in need of relief.

The only other question was in relation to the settlement of Bemis in the town of Dummerston. It was conceded his father had a settlement there, prior to the spring of 1821, when he removed with his family to Townshend, this son George Bemis being then five years of age. He leased a farm in Townshend, which was stocked by the owner of the farm and carried on by said Bemis senior, at the halves, until March or April, 1830, when he returned to Dummerston. During the time of car-

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rying on the farm, that and the stock were set in the grand list, jointly to the landlord and Bemis, and the latter by the terms of the lease, was to pay one-half of the taxes, which, the defendant proposed to show, were more than \$120 for five successive years.

There was no evidence of any registration of the name of Bemis or his family in the town clerk's office in Townshend.

The court held that the legal settlement of the pauper was in the town of Dummerston, to which the defendant excepted.

Butler & Wheeler, for the defendants.

_____ for the plaintiff.

KELLOGG, J. This is an action of assumpsit for the recovery of the expenses of the support of George Bemis, a pauper confined in the county jail in the town of Newfane, whose legal settlement, as alleged by the plaintiff, is in the town of Dummerston, and the action is founded on Comp. Stat. p. 133, § 16. The questions made on the argument relate, first, to the proof that the pauper was "committed" to the jail, and, secondly, to the proof of the pauper's legal settlement in Dummerston.

I. It is claimed that the warrant on which the pauper was committed to jail was illegal and void, so that it could not furnish any justification for his arrest and detention, and that he was not within the purview of the statute, or in any legal sense "committed" to the jail. If a pauper imprisoned in jail is in need of relief, it would be a very strict construction of the statute which would withhold it on the ground of the illegality of his commitment and detention, and would leave him to starve while awaiting the determination of that question. The statute provision, being for a charitable and humane purpose, should be construed liberally. We are of opinion that an actual commitment to the jail is sufficient to cast the duty of providing for the relief and support of an imprisoned pauper, who stands in need of such relief and support, on the jailor, and on the overseer of the poor of the town in which the jail is situated, after the requisite notice has been given, agreeably to the stat-

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ute ; and that this duty is not in any degree dependent on the regularity and validity of the process upon which the commitment was made. In this view, the case does not call for the consideration of the objections which have been suggested against the legality of the process on which the pauper was committed to the jail.

II. It is not disputed that the pauper's father had, prior to the year 1821, a legal settlement in Dummerston, and that the pauper's settlement is there now,—he having acquired no settlement for himself, and being entitled to the settlement of his father,—unless his father subsequently gained a new settlement in the town of Townshend. A settlement in Dummerston being established, the legal presumption is, till the contrary is shown, that it continued there ; and it is therefore incumbent on the defendant to prove a change of settlement.

1. The defendant undertook to show that the pauper's father acquired a settlement in Townshend in two distinct ways, the first of which was by a residence in that town for the term of seven years and more, as provided in the eighth clause of the first section of the act of 1817. (Slade's Comp. Laws, p. 282.) That clause with its proviso, required an act of registry, in addition to the fact of residence, in order to make a change of settlement by residence operative or complete,—the proviso expressly declaring that no person should gain a settlement in any town by mere residence without such registration, and that residence to gain a settlement should be computed only from the date of such registry. This proviso was repealed by an act passed October 21st, 1823, (Slade's Comp. Laws, p. 355, No. 8,) but the repealing act declared that no residence before that time had under the eighth clause aforesaid, without any registry as required by said proviso, should be deemed to have any effect towards giving or gaining any future settlement of any person. As mere residence without registration, prior to the repeal of the proviso by the act of 1823 above mentioned, would have been wholly ineffectual towards giving or gaining a settlement, we think that it was incumbent on the defendant when seeking to establish a change of settlement, by reason of the residence of the pauper's father in Townshend prior to the passage of the act of 1823, to show af-

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firmatively the fact of registry, as well as of residence. As the case shows that there was no evidence of any registration of the pauper's father or his family, in Townshend, in compliance with the requirements of the proviso to the eighth clause of the first section of the act of 1817, above cited, it necessarily follows that his residence in that town, when considered with reference to its effect in gaining a settlement for him in that town, can be computed only from the time of the repeal of that proviso by the act of 1823, and his residence in that town prior to the passage of 1823 being excluded, it is not claimed that his subsequent residence there was sufficient to gain a settlement for him.

2. The defendant also claimed that the pauper's father acquired a settlement in Townshend in another way,—by a residence there with ratable estate, held in his own right, exclusive of his poll, set in the list of that town, at the sum of sixty dollars or upwards, for five years in succession, as required in the fourth clause of the first section of the act of 1817. (Slade's Comp. Laws, p. 381.) It appears that the pauper's father, after his removal to Townshend in the year 1821, took a farm in that town as a tenant or lessee, which was stocked by the owner or lessor, and carried it on "at the halves" until the spring of 1830 when he returned to Dummerston;—that, during the time of carrying on the farm, both the farm and stock were set in the grand list to himself and the owner jointly, and that he, by the terms of the lease under which he took the farm, was to pay one-half of the taxes on the farm and stock;—and the defendant proposed to show by parol evidence (the several lists being lost,) that the half of the taxes upon these joint lists amounted to the taxes upon a list of more than one hundred and twenty dollars in all, for five successive years during the time of the residence of the pauper's father in Townshend. The county court held that the property so set in the lists, not being held by him in his own right, such lists did not come within the conditions of the statute in respect to the manner of gaining a settlement, and rejected the evidence. The language used in the statute,—“whose ratable estate, held in his own right, besides his poll, shall be set in the list of such town,” etc.,—clearly excludes, as we think all ratable property to which the person listed has no other right than a right of temporary possession merely, as in the case of

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property held by an executor, administrator, guardian, agent, bailee, or trustee; and we are unable to regard such property when leased by a landlord to a tenant, as resting on any different ground. It is the property of the landlord, and held in his right; and when set in the list to the landlord and the tenant jointly, as in this case, it might gain a settlement for the landlord if the other conditions of the statute were complied with; but it could not aid the settlement of the tenant, who has nothing but a mere right to the temporary possession of it. We find no error in the decision of the county court upon this part of the case.

Judgment of the county court for the plaintiff affirmed.

DEXTER GILBERT AND WIFE v. J. J. CRANDALL.

Sheriff. Receptor. Bailment. Contract.

A receptor of property attached, if entrusted therewith without the agency of the creditor, is the agent of the officer making the attachment, and for his torts or neglect in respect to the property the officer is liable.

The insolvency of the receptor, and his consequent inability to respond to a demand on the execution for the property, furnish no defence for the officer in an action by the creditor for not safely keeping the property to respond to the execution.

CASE against the defendant, as sheriff of the county of Windham, for not safely keeping and delivering to the officer having an execution, five hundred barrels of flour attached by him on mesne process. The plaintiff, proved the attachment, the recovery of judgment, and the issue of execution in the action, in the manner set forth in the declaration, together with the demand of the property and the refusal of the defendant to deliver the same. The defendant then offered evidence that after he attached the property he delivered the same for safe keeping to Calvin Townsley and Charles W. Townsley, two persons amply responsible for the amount, and took their receipt for the same, and that before the property was demanded of him, the receiptors had failed

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and became wholly insolvent, whereby it became impossible for them to re-deliver the property, and so the defendant could not restore it at the time it was demanded of him. To this testimony the plaintiffs objected, and the court rejected it, to which the defendant excepted. No other question was made in the case.

The court at the April Term, 1860, REDFIELD presiding, gave judgment for the plaintiffs, to which the defendant excepted.

Asa Keyes, for the defendant.

E. Kirkland, for the plaintiff.

PECK J. This is an action on the case against the defendant, as sheriff of the county of Windham, for not safely keeping and delivering to the officer having the execution, five hundred barrels of flour attached by him at the suit of the plaintiffs against Calvin Townsley on the original writ.

The plaintiffs made the necessary proof to entitle them to recover—and among other things proved that the officer having the execution for collection made seasonable demand on the defendant for the property, and that the defendant did not deliver it.

The case shows that the defendant “then offered evidence that after he attached the property, he delivered the same for safe keeping to Calvin Townsley and Charles W. Townsley, two persons amply responsible for the amount, and took their receipt for the same, and that before the property was demanded of him, the receiptors had failed and become wholly insolvent, whereby it became impossible for them to redeliver the property, and so the defendant could not restore it at the time it was demanded of him.” The county court, on objection by the plaintiffs, rejected the evidence, and gave judgment for the plaintiffs and the defendant excepts to the ruling of the court rejecting this testimony.

The only question is, whether the evidence offered by the defendant and rejected by the court, constituted a defence. On reference to the declaration it appears that Calvin Townsley, one of the officer's bailees, was the defendant in the action in which the property was attached. No evidence was offered to show that the

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property was accidentally destroyed or lost without any fault or want of care on the part of the receiptors or the officer, nor what became of it, other than that by reason of the insolvency of the receiptors intervening between the delivery of the property to them and the time of the demand on the defendant, it became impossible for them to deliver it to the defendant, and the defendant to the officer having the execution, when he demanded it of the defendant. It is not shown or offered to be shown how the insolvency of the receiptors rendered it impossible for them to return the property. Whether it was by its having been in the possession of Calvin Townsley, the execution debtor and one of the receiptors, at the time of the insolvency of the receiptors, and having been attached as his property at the suit of other creditors, or whether the receiptors sold it, or in some other way converted it to their own use, and by reason of their insolvency were unable to respond for its value or pay the amount of the execution, the case does not disclose. If the former, then the defendant has been guilty of official neglect in not taking and keeping the property out of the possession of the debtor and in suffering it to remain in his possession and be attached by other creditors, unless an attaching officer has a right to substitute in place of the property a receipt or contract of the debtor, with good surety, to return the property or pay the debt, and then let the property go back and remain in the possession of the debtor, exposed to attachment by other creditors, and hold such contract or receipt at the risk of the attaching creditor as to the fidelity or ultimate solvency of the receiptors, thereby substituting the receipt for the property or a replevin bond under the statute. It is difficult to see how the insolvency of the receiptors could render it impossible for them to return the property unless it was attached by some other creditor of the debtor, for it could not legally be attached as the property of the other bailee. The court think that for this neglect of the officer in thus exposing the property to attachment by other creditors of the execution debtor the defendant is liable, and that he has no right to substitute such receipt at the creditor's risk of the ultimate solvency of the signers, but is bound to put and keep the property beyond the reach of other creditors, or use due and proper care to effect that end. One of

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the main objects of an attachment on *mesne* process is to guard the debtor's property against that risk.

But suppose we take a broader view of the evidence offered and suppose the other alternative, that the receiptors converted the property to their own use, is the sheriff then excused from liability? The bailees are the agents of the officer and not of the creditor; they are selected by him and not by the creditor; the officer has the special property in the goods by the attachment, and he can retake the property at any time he deems it necessary for his security, or for any other reason satisfactory to him; the contract is a personal one between him and the receiptors, and he, and not the creditor, has the remedy upon it; and in all this the creditor has no right to interfere or direct. This right of control should be in the officer rather than the creditor, for the debtor has an interest the officer is bound to protect. The bailees then must be regarded as the agents of the officer. The official duty of the officer is to safely keep the property and he, and he alone, is clothed with the requisite power to do so. This duty he owes to the creditor. He may perform it personally or by his agents selected by him for that purpose. In this view of the case the property has been elained or put beyond the reach of the creditor's execution by the culpable act or neglect of the agents or servants of the officer who attached it upon the writ, and whose duty it was to keep it, and the officer must be held responsible for the wrongful acts or neglect of his agents or servants to whom he entrusted the discharge of this duty. This is but the application of a familiar principle. It is not a case that comes within the principle that the officer is not liable for a loss without any fault or want of care on his part. To bring it within that principle it must appear that the loss was without fault of himself or his servants or agents.

But it is claimed that it is a long settled practice for officers to take such receipts, and as they are recognized as legal contracts, the liability of the officer in such cases ought to be no greater than in case of taking bail on *mesne* process, replevin bonds, &c.; but it may be answered that it is a practice equally well settled to treat such receipts as at the risk of the officer so

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far as it relates to the fidelity and final ability of the receiptors to respond.

But it will be seen that there is but a slight analogy between the two classes of cases. The taking of such receipts is entirely voluntary on the part of the officer while in the case of bail on *mesne* process and replevin bonds it is compulsory if the persons offered are good and solvent, and the officer is thereupon bound in case of such bail to let the defendant go at large, and in case of a replevin bond to deliver the goods and thereafter he has no control or custody or power over either. Hence in these cases the officer is only bound to see that the bail is good when taken, but in case of bailment of property attached the officer is under no such compulsory obligation, and his control over the property and right to repossess himself of it does not cease with the bailment but continues till the attachment is dissolved or the lien of the creditor is gone.

The statute provides a mode by which the debtor can obtain possession of his goods attached on *mesne* process and hold them pending the attachment,—that is by writ of replevin. In such case some other officer who has the writ of replevin takes a replevin bond and then takes the goods from the attaching officer by virtue of the writ of replevin and delivers them to the debtor, and then all liability of the attaching officer for the goods ceases; and if the replevin bond is good when taken, the creditor is obliged to rely solely on the bond; but if not good when taken, his remedy is not on the attaching officer but on the officer, who serves the replevin. We think it will not do to allow an attaching officer to substitute a personal contract to himself for the mode prescribed by statute and throw the risk on the creditor. If he wishes to be absolved from the care and custody of the goods and the consequent risk, he must let the defendant resort to the statute remedy,—and, then the creditor has a right to look to the replevin bond, and if that is not good when taken, to the officer who serves the replevin.

If an officer is absolved from the risk of the receiptor's intervening insolvency, it is difficult to see why the creditor should not in all cases be compelled to seek his remedy on the receipt when the receiptors fail to deliver the property, and prosecute the

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receipt at *his own* expense. The general right to secure debts by attachment on *mesne* process seems to be peculiar to the New England States, and but little light is to be obtained from decisions elsewhere. It has existed nearly or quite ever since the organization of the State, and I understand the practice to have been uniform to hold the officer to the risk of the fidelity and solvency of his bailees or receiptors, and it may with propriety be said to be the common law of Vermont. Such I understand to be the rule in the other New England States, unless in New Hampshire a different rule may be established.

In New Hampshire the question, it seems, first arose in *Runlett v. Bell*, 4 N. H. 433, in 1831. One ground on which the court held the sheriff not liable in that case, was that pending the suit in which the goods were attached, the creditor applied to the sheriff for, and took the receipt and prosecuted it in order to try the title to the property in an action on the receipt, the receiptors claiming to own the property, and by the negligence of the creditor that suit was delayed so that the receiptors failed before judgment was obtained on the receipt, and the court held that the creditors had thereby adopted the receipt and made it his own, and absolved the officer. This was undoubtedly correct. It is true the court went further and said that if the officer is guilty of no negligence in taking the receipt the solvency of the receiptors is at the risk of the creditors. And the court also goes so far as to say that if it was *apparently* good when taken the officer was not liable. They further say that "it is true that when goods are attached the sheriff may retain them in his own custody *in all cases* if he choose,"—and, evidently being pressed with the necessity of having some way by which the debtor could obtain possession of his goods, they justify the officer in taking a receipt at the risk of the creditor. It would seem from the whole language of the court that in that State there was no mode provided by statute by which the debtor could obtain his goods pending the attachment, and if so, the main reason on which the court based their decision of this point in that case, fails here, where the legislature have provided a remedy for the evil by writ of replevin. If it is a good defence in a suit by the creditor for the officer to show that he took a good receipt it must be so

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in a suit by the debtor for the property when the original suit terminates in favor of the defendant, or the attachment or lien is otherwise discharged. This would be a severe doctrine to apply to the debtor in a case where he has had no agency in procuring the property to be receipted.

We do not intend by this decision to decide that an officer who attaches property on *mesne* process is liable in case of loss without fault or want of prudence, but simply to decide that the default of his agents or servants is his default, and that he is liable not only for his own torts and neglect, but also for the default and neglect of his agents or servants, and that his bailees or receiptors, selected without the procurement or concurrence of the creditors, are his agents or servants. Therefore the evidence offered was properly excluded.

Judgment affirmed.

THOMAS SUMNER v. AMOS A. BROWN, APPT.*Attachment Election. Waiver. Referee. Amendment.*

If one, who has two cows at the time one of them is taken under a writ of attachment, sues the attaching officer in trespass, on the ground that the cow taken was his only cow and therefore exempt from attachment under the statute, supposing at the time that the other cow in his possession belonged to his deceased wife's estate, he cannot, on failing to establish the latter fact, change the ground of his action by claiming the right to elect which of the two cows should be treated as exempt. Such right of election if it existed at all, must, under the circumstances, be regarded as having been waived, as he did not attempt to exercise it at the time of attachment.

If a referee hears and determines other matters than those embraced in the issue formed in the case referred to him, it is not error, provided the other matters are such as might be brought into the case under any amendment which the county court could legally have allowed the party to make to his pleadings.

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Such amendments to the pleadings are liberally allowed by the courts as tending to promote trial and determination on the subject matter in controversy upon which the action was originally really based ; but no amendment can be allowed which introduces into the case a new substantive cause of action different from that declared upon and different from that which the party intended to declare upon when he brought his action.

Therefore, where the plaintiff, who had only two cows, and had sued the defendant, who was deputy sheriff, in trespass for attaching one of the cows, on the ground that the cow was exempt from attachment by law offered on the trial before a referee to prove that on the next day after the cow in suit was attached, the defendant came and took away the other cow also, and converted her to his own use ; *Held* that such proof could not have been properly admitted by the referee.

TROVER, with a count in trespass for taking a certain "red lined-back cow." Plea, the general issue with a notice of justification under legal process.

The case was referred and the referee reported the following facts :—The cow in question was taken by the defendant as deputy sheriff upon a writ of attachment issued in favor of one Brown against the plaintiff. There was no question made as to the legality of the proceedings. The plaintiff claimed that it was his only cow and not liable to attachment. The plaintiff was not consulted and gave no leave concerning the attachment. The plaintiff testified that the cow in suit was his only cow, but on cross-examination testified, and the referee found that from ten to fifteen years before the plaintiff's father-in-law gave the plaintiff's wife a cow which was kept upon the farm and used as his other stock, except that he supposed the title to her to be in his wife. This cow was milked and fed with the other cows. The plaintiff kept her five or six years, and fattened and killed her, and used the beef in his family. Before this cow was butchered she had a calf which was grown upon the farm and became a red cow, and was on the farm at the time of the attachment of the cow in suit and was some eight or ten years old. She had always been treated by the plaintiff as his other cows, except that he supposed the title to her to be in his wife or her estate. The plaintiff's wife died in the spring before the attachment of the cow in suit and at her decease this cow was upon the farm occupied by the plaintiff and his family, and the plaintiff supposed that she belonged

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to his wife's estate. The title to the farm was in the plaintiff's wife at her decease. The plaintiff continued to occupy the farm as he had done down to and after the attachment. At this stage of the proof the plaintiff offered to prove that the next day after the cow in suit was attached, the defendant came and took away the red cow also and converted her to his use; to which the defendant objected and the referee excluded the proof; and found that the cow in suit was not the plaintiff's only cow, unless from the facts above set forth the court as matter of law should decide that the red cow was not the defendant's property.

The county court, at the September term, 1860, REDFIELD, CH. J., presiding, rendered judgment, on the above report, for the defendant to recover his costs, to which the plaintiff excepted.

Davenport & Haskins, for the plaintiff.

P. T. Washburn, for the defendant.

PIERPOINT, J. It is conceded in the argument, that, on the facts reported by the referee, the plaintiff was the owner of two cows at the time the attachment was made and the cow taken by the defendant for which this suit is brought. When this cow was taken the other was left, so that the plaintiff had still the number exempt from attachment. The plaintiff now claims that under the statute, he had the right to elect which of the two cows should be the "one cow" exempt by the statute. Without attempting to decide the question as to the right of the debtor to elect in such case, or to express any opinion as to the construction that should be put upon the statute, it is sufficient here to say that if the plaintiff had the right, he did not exercise it, or attempt to exercise it at the time. He did not then suppose he had but one cow, but claimed that the cow now in question was his only cow and was not subject to attachment. The red cow referred to, he insisted, belonged to the estate of his deceased wife, and, continued so to claim at the time he brought this suit, and up to the time of trial before the referee, and the main question litigated there was whether or not the red cow belonged to him. Of course it is not to be supposed that he attempted to make

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any election between the two cows, as it would have been directly at variance with his claim, and at war with the whole theory of his case. Having taken that position, and maintained it manfully, until he is fairly driven from it by the report of the referee, it is now too late for him to say, I will change my ground and elect of the two cows that I am found to be the owner of, the one I have sued for and thus be enabled to recover.

The right to elect, if it existed at all, under the circumstances of this case, must be regarded as having been waived.

Upon the trial before the referee "the plaintiff offered to prove that the next day after the cow in suit was attached, the defendant came and took away the red cow also, and converted her to his use." Upon the pleadings in the case, as it stood before the referee, there can be no question that this evidence was inadmissible, as having no tendency to prove the issue; if the testimony had been admitted, and a recovery had thereon, it would have been for a different trespass and for different property than that declared for in the declaration. But it is insisted that the county court might have allowed the plaintiff to amend his declaration so as to make the evidence admissible, and enable him to recover for the red cow, if he succeeded in making the necessary proof, and that therefore the evidence should have been admitted by the referee.

The rule is well settled in this state by repeated decisions that if the referee proceeds to hear and determine other matters than those embraced in the issue formed in the case referred to him, it is not error, and the report will not, for that reason, be set aside; provided the other matters are such as the party might bring into, and have determined in the case, under any amendment the county court might legally have allowed the party to make in the pleadings. Whether it would be error in the referee to refuse to hear and determine such matters outside of the issue is not the question now under consideration; but the question is, could the county court have *legally* allowed an amendment that would have made such testimony admissible in this case. Courts in this, as in other states, are inclined to go to the extreme verge of liberality in allowing parties so to amend the pleadings as to permit the trial and determination of the the real subject

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matter in controversy, upon which the matter was originally really based. that which the party brought his action to recover for, and what he and his attorney supposed he was declaring for. This rule may have some qualifications, but it is not necessary here to enquire what they are. On the other hand our courts have adhered rigidly to the rule that no amendments are to be allowed, which introduce into the case a new substantive cause of action, different from the one declared upon, and different from that which the party intended to declare upon, and recover for when he brought his action. This rule we believe has never been departed from in this state and we see no reason why it should be.

The offer in this case was to prove a new and different cause of action, a trespass committed at a different time, by the taking of a different article of property, and one that is not described in the declaration, and which the party did not intend to recover for when he brought his action and which at the time he commenced his suit he honestly supposed he did not own.

This we think could not have been made admissible by any amendment that the county court could have legally made, and it was properly rejected.

Judgment affirmed.

THOMAS REED v. JOHN CANADY, *Appellant*.*Contract. Sale.*

The plaintiff bought from G. a mare, supposed by the parties to be with foal, agreeing to give for her the colt (which the mare was expected to have,) when it should become four months old. The mare was in fact not with foal at the time, and had no colt while the plaintiff possessed her, and the plaintiff never paid to G. any colt, or anything else, for the mare. The plaintiff kept possession of the mare nearly three years when she was attached by the defendant, as deputy sheriff, at the suit of a third party as the property of G., and taken from the plaintiff's possession. *Held* that the title to the mare passed to the plaintiff on the completion of the contract with G., and the fact that it was impossible for the plaintiff to pay for her in the manner

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agreed upon, did not render the sale void, but only rendered the plaintiff liable to pay for the mare in another way.

Held, also, that even if the contract was of such a character that G. might have rescinded it and insisted upon a return of the mare, yet, as he had not done so, a third person could not interfere and set aside a contract with which the parties appeared satisfied, and which was not made in violation of such third person's rights or interests.

TROVER, to recover the value of a mare.

The case was referred and the referee reported the following facts: The mare in question was bought by the plaintiff of one Goodell, in June 1855, and the plaintiff had possession of her until the taking by the defendant in April, 1858. When the plaintiff had the mare of Goodell, it was supposed by both the plaintiff and Goodell that she was with foal and would have a colt the next spring; and the plaintiff agreed to give Goodell for the mare, the colt, when it was four months old, which the mare should bring. The mare had no colt while the plaintiff possessed her, and the plaintiff never paid to Goodell any colt, or any other thing for the mare.

The defendant, as deputy sheriff, attached the mare as the property of Goodell, by virtue of a writ in favor of one Sanford against Goodell, in April, 1858, and took her from the plaintiff's possession and sold her on execution to satisfy the judgment rendered in the suit of Sanford against Goodell.

The referee found that the mare, when taken by the defendant from the plaintiff, was worth nineteen dollars, and from the foregoing facts decided that the plaintiff should recover of the defendant nineteen dollars and interest from April 14, 1858.

The county court, at the April term, 1860, REDFIELD, CH. J., presiding, rendered judgment *pro forma*, on the report, for the plaintiff to recover twenty-one dollars and twenty-eight cents, to which the defendant excepted.

W. H. Follett, for the defendant.

T. H. Streeter, and H. N. Hix, for the plaintiff.

PIERPOINT, J. The only question raised upon the argument of this case is whether the property in the mare in controversy

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property was accidentally destroyed or lost without any fault or want of care on the part of the receiptors or the officer, nor what became of it, other than that by reason of the insolvency of the receiptors intervening between the delivery of the property to them and the time of the demand on the defendant, it became impossible for them to deliver it to the defendant, and the defendant to the officer having the execution, when he demanded it of the defendant. It is not shown or offered to be shown how the insolvency of the receiptors rendered it impossible for them to return the property. Whether it was by its having been in the possession of Calvin Townsley, the execution debtor and one of the receiptors, at the time of the insolvency of the receiptors, and having been attached as his property at the suit of other creditors, or whether the receiptors sold it, or in some other way converted it to their own use, and by reason of their insolvency were unable to respond for its value or pay the amount of the execution, the case does not disclose. If the former, then the defendant has been guilty of official neglect in not taking and keeping the property out of the possession of the debtor and in suffering it to remain in his possession and be attached by other creditors, unless an attaching officer has a right to substitute in place of the property a receipt or contract of the debtor, with good surety, to return the property or pay the debt, and then let the property go back and remain in the possession of the debtor, exposed to attachment by other creditors, and hold such contract or receipt at the risk of the attaching creditor as to the fidelity or ultimate solvency of the receiptors, thereby substituting the receipt for the property or a replevin bond under the statute. It is difficult to see how the insolvency of the receiptors could render it impossible for them to return the property unless it was attached by some other creditor of the debtor, for it could not legally be attached as the property of the other bailee. The court think that for this neglect of the officer in thus exposing the property to attachment by other creditors of the execution debtor the defendant is liable, and that he has no right to substitute such receipt at the creditor's risk of the ultimate solvency of the signers, but is bound to put and keep the property beyond the reach of other creditors, or use due and proper care to effect that end. One of

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the main objects of an attachment on *mesne* process is to guard the debtor's property against that risk.

But suppose we take a broader view of the evidence offered and suppose the other alternative, that the receiptors converted the property to their own use, is the sheriff then excused from liability? The bailees are the agents of the officer and not of the creditor; they are selected by him and not by the creditor; the officer has the special property in the goods by the attachment, and he can retake the property at any time he deems it necessary for his security, or for any other reason satisfactory to him; the contract is a personal one between him and the receiptors, and he, and not the creditor, has the remedy upon it; and in all this the creditor has no right to interfere or direct. This right of control should be in the officer rather than the creditor, for the debtor has an interest the officer is bound to protect. The bailees then must be regarded as the agents of the officer. The official duty of the officer is to safely keep the property and he, and he alone, is clothed with the requisite power to do so. This duty he owes to the creditor. He may perform it personally or by his agents selected by him for that purpose. In this view of the case the property has been elained or put beyond the reach of the creditor's execution by the culpable act or neglect of the agents or servants of the officer who attached it upon the writ, and whose duty it was to keep it, and the officer must be held responsible for the wrongful acts or neglect of his agents or servants to whom he entrusted the discharge of this duty. This is but the application of a familiar principle. It is not a case that comes within the principle that the officer is not liable for a loss without any fault or want of care on his part. To bring it within that principle it must appear that the loss was without fault of himself or his servants or agents.

But it is claimed that it is a long settled practice for officers to take such receipts, and as they are recognized as legal contracts, the liability of the officer in such cases ought to be no greater than in case of taking bail on *mesne* process, replevin bonds, &c.; but it may be answered that it is a practice equally well settled to treat such receipts as at the risk of the officer so

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should have been endorsed on the note at that sum. This was contradicted by the testimony of the plaintiff. In the fall of 1857, Dennison, the payee, became insolvent and turned out this note to the plaintiff to secure another note upon which Deunison and a brother of the plaintiff were liable to a bank in Brattleboro, and afterwards the note in suit was placed in the hands of one Stone to collect the balance due thereon, and pay it to the bank upon the note for which the note in controversy was held as collateral security. While the note in question was in the hands of Stone for this purpose, the defendant was called on for payment and a controversy arose between Stone, the plaintiff, and the defendant as to the amount due thereon, the defendant insisting that the sum of thirty dollars, being the value of the harness above mentioned, should have been endorsed upon the note under date of Oct. 27, 1857.

The referee reported that he was satisfied from the testimony that it was not understood between Dennison and the defendant that the thirty dollars should be endorsed upon the note and that the defendant did not so consider or intend until after the failure of Dennison. And being satisfied that the plaintiff became the owner of the note before the commencement of this suit, the referee found for the plaintiff to recover of the defendant the sum of thirty-four dollars and twenty-three cents, for principal and interest, subject, however, to the following legal question: The referee found from the evidence that on the 20th of February, 1858, while the note was in the hands of Stone for collection, and after the interview above mentioned between Stone, the plaintiff and the defendant, the defendant tendered to Stone the sum of three dollars and ten cents, saying that "he tendered said sum as the balance due upon said note;" that Stone received the same saying "he would take it to the bank, and they might do as they were a mind to," and that he afterwards endorsed the same upon the note, being the endorsement of Feb. 20, 1858, above given. The referee further reported that he was of opinion that this conduct and action of Stone amounted in law to an accord and satisfaction, and was a bar to the plaintiff's recovery; and he therefore found for the defendant to recover his costs. But if the court should decide that the referee

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erred in this opinion, then he found for the plaintiff to recover thirty-four dollars and twenty-three cents, and his costs.

The county court, at the September term, 1860, REDFIELD, CH. J., presiding, rendered judgment on the foregoing report for the defendant, to which the plaintiff excepted.

Davenport & Haskins, for the plaintiff.

T. H. Streeter and Stoughton & Grant, for the defendant.

PIERPOINT, J. The referee in this case has reported that there is due to the plaintiff from the defendant the sum of thirty-four dollars and twenty-three cents, unless the facts reported by him amount in law to an accord and satisfaction of the claim so as to bar the plaintiff's right of recovery. The referee finds that before the commencement of this suit, "the defendant tendered to one Stone (who then had the note as the attorney of the Bank of Brattleboro, to which the notes had been transferred) the sum of three dollars and ten cents, saying that he tendered said sum as the balance due upon said notes; that said Stone received the same "saying he would take said amount to the bank and that they might do as they were a mind to," and that he afterwards endorsed the same upon said note." To constitute an accord and satisfaction it is necessary that the money should be offered in satisfaction of the claim, and the offer accompanied with such acts and declarations as amount to a condition that if the money is accepted, it is accepted in satisfaction, and such that the party to whom it is offered, is bound to understand therefrom, that if he takes it, he takes it subject to such condition.

When a tender or offer is thus made the party, to whom it is made, has no alternative but to refuse it, or accept it upon such condition. If he takes it his claim is cancelled, and no protest, declaration, or denial of his, so long as the condition is insisted on, can vary the result. This principle is too well settled in this State to require either argument or the citation of authorities to support it.

Do the facts reported amount to such an offer and acceptance? The defendant said, "I tender the sum as the balance due on the

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note." This is merely an assertion of what he claims and an identification of the demand upon which he makes the tender. It is simply saying "I tender this sum it being all that is due upon the note." This we think is the only fair construction that can be put upon the language. It would be somewhat difficult for a man to make a tender of what he conceded to be due upon a particular demand in more simple and unequivocal language than that adopted in this case. It is only expressing in words the intent and purpose with which any tender is made. The person who makes a tender does it because it is the amount or balance that he concedes to be due, and he makes it for that reason, and if he declares it to be so, it does not change the character of the act. If such language is to be construed into a condition, a man could hardly make a tender that should be sufficiently certain and explicit to be proved as applicable to a particular demand, without destroying its effect as a tender, for the reason that it was conditional.

There is nothing in the language used that could fairly convey the idea to Stone that it was offered upon the condition that if he took it, he did so in satisfaction of the note. Neither does the language or conduct of Stone when he received it indicate that he understood it. He received the tender, understanding that the defendant claimed that sum to be all that was due; he accepted the tender, and said he would take it to the bank and they might do as they pleased, and that is precisely what every person does and has a right to do when money is tendered to him, he may accept it and abandon any further claim, or he may apply it on the claim, and sue for the balance, "he may do as he has a mind to" in regard to that. In this case the money was indorsed on the note, and this suit afterwards brought for the balance. Construing the report as we do, the transaction falls far short of an accord and satisfaction. It might be said perhaps that the evidence in the case, had some tendency to show an accord and satisfaction, and if the referee had found the fact that the parties understood it as an accord and satisfaction, such finding might have been conclusive, but he has not done so, but decided that upon the facts reported, it was an accord and satisfaction as a matter of law.

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It is contended that this case comes within the principle recognized in *McGlynn v. Billings*, 16 Vt. 330. The cases are widely different. In that case there was no attempt to make a tender and neither party could have so understood it. The defendant in that case offered the plaintiff an order drawn by himself upon another person, as the balance due to him; the plaintiff declined receiving it, and, the defendant then put the order into the hands of a third person, and directed him, in the presence of the plaintiff, to deliver it to the plaintiff, provided he would receive it as the balance due to him. The plaintiff did subsequently receive it. The court held that such an acceptance by the plaintiff, he knowing the terms upon which it was offered, operated as a settlement of his claim, notwithstanding the party when he took the order, declared that he did not receive it in full.

The cases of *Cole v. The Transportation Co.* 26 Vt. 87; *McDaniels v. Lapham*, 21 Vt. 222, and *McDaniels v. The Bank of Rutland*, 29 Vt. 250, were all decided, so far as this question is concerned, upon the ground that the offer was made upon the express condition that if accepted it was to be in full, and so understood by the parties.

In *Miller v. Holden* 18 Vt. 337; *Gassett v. Andover* 2 Vt. 342, and *Brigham v. Davis* 29 Vt. 1, it was held that the acceptance of the money did not discharge the claim, on the ground that it was not accepted with the understanding that it was to be in full.

The principle recognized in all of these cases, when applied to the case under consideration, places the plaintiff's right to recover the amount found to be due on the note, beyond controversy.

Judgment of the county court reversed, and judgment for the plaintiff to recover the sum of thirty-four dollars and twenty-three cents with the interest thereon and costs.

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JOHN REED v. STOCKWELL & WARREN, *Appellant.**Account. Jurisdiction. Waiver. Reference.*

Where one had an account for articles sold to another who soon after the purchase became associated in partnership with a third person, and the creditor severed his account, and brought two suits before a justice of the peace, one against the purchaser of the articles alone, and the other against the latter and his new co-partner jointly, the severance of the account, which was altogether more than one hundred dollars, bringing the amount claimed in each suit within the jurisdiction of the justice; *held* that as the plaintiff appeared, from the facts proved, to have brought the suit against the firm in good faith and upon reasonable grounds of belief that he could sustain the action against the co-partner of the purchaser for that portion of his account embraced in such action, the plaintiff was justified in severing that portion of the account from the other, although, as it resulted, the purchaser's partner was not in fact liable to the plaintiff, who obtained judgment only against the purchaser; and that the justice, therefore, had jurisdiction of both cases.

If a justice of the peace, not having jurisdiction of a suit, by reason of the amount in controversy, tries it, and the judgment is appealed from to the county court where it is referred by the parties to a referee for trial, the parties thus creating a tribunal of their own selection for the trial, thereby waive the objection which they might have made to the jurisdiction of the court.

And especially so, where by the terms of the reference the objecting party agreed to interpose no motion to dismiss if the suit was tried by the referee.

ASSUMPSIT. This case, and another in favor of the same plaintiff against the defendant Stockwell alone, in which the plaintiff's claim was sixty-nine dollars and eighty-seven cents on account, were originally brought before a justice of the peace, and were carried to the county court by appeal. In the latter court the present case was referred by an agreement of the parties thereto, under a rule of which the following is a copy:

"Referred to Abishai Stoddard to be tried according to law, and all matters of controversy between the parties, together with the costs of this suit, growing out of all questions of jurisdiction and otherwise; the defendant agrees to interpose no motion to dismiss provided the suit is heard and determined by the referee aforesaid."

The referee reported the following facts: The plaintiff's claim was one hundred dollars, for a quantity of hay and a hay cutter. On or about the 23d day of November, 1857, the plain-

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tiff sold the hay and hay cutter to the defendant Stockwell, for the above sum.

At that time the defendant Stockwell was the owner of a tavern-house, saw and grist mills and other real estate, and was keeping a house of entertainment, and the defendant Warren was at work for him by the month.

On the 2d day of December next following the plaintiff saw Warren and said to him, "you have bought in here I understand." Warren replied, "they say so," and gave the plaintiff to understand, and intended to do so, that he had purchased an undivided half of all Stockwell's real and personal property and was concerned with him in the business.

Soon after this, but whether before or after the 8th day of December did not distinctly appear, the plaintiff again saw Warren and inquired of him how far he was responsible for the property he, the plaintiff, had sold to Stockwell, and Warren replied, that he was not responsible for anything but the hay and hay cutter, and that the plaintiff might look to him for the price of one-half of those. The plaintiff then supposing that the defendants were in company made an entry of the hay and hay-cutter upon his book to Stockwell & Warren, not having previously made any charge of them.

On the 8th day of December, Stockwell executed a deed to Warren of an undivided half of all his real and personal estate, and the defendants in fact formed a partnership on that day. There was no evidence showing that Warren agreed to become responsible for the private debts of Stockwell due at the formation of the partnership. Both Stockwell and Warren testified that the hay purchased by Stockwell was considered, and formed a part of the purchase by Warren of Stockwell.

The referee found that the defendant Warren was not liable to the plaintiff in this action for the hay and hay-cutter or any part thereof, subject to the opinion of the court upon the facts reported; and that if the plaintiff was entitled to recover of the defendant Stockwell, he should recover the sum of one hundred dollars and interest thereon from Nov. 24, 1857.

The county court, at the September term, 1860, REDFIELD, CH. J., presiding, rendered judgment for the plaintiff on the fore-

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going report, against the defendant Stockwell alone, and the latter excepted.

Butler & Wheeler, for the defendant.

Field, Davenport & Haskins, for the plaintiff.

ALDIS J. The objection to the decision of the county court is, that the court have found that Warren was not liable for the one hundred dollars, charged by the plaintiff to Stockwell & Warren, but that Stockwell was chargeable alone; and that as the amount thus charged by plaintiff to Stockwell in this suit, being one hundred dollars, should properly have been joined to the sixty-nine dollars and eighty-seven cents, sought to be recovered by the plaintiff of Stockwell alone in the other suit, and if so joined would have exceeded the jurisdiction of a justice of the peace,—that these suits should be dismissed for want of jurisdiction in the justice's court where they were originally brought.

The plaintiff appears to have brought this suit against the firm of Stockwell & Warren in good faith, and upon reasonable grounds of belief that he could sustain this action as against Warren. He appears to have relied on Warren's statement to him that he was liable with Stockwell for the hay and hay-cutter here sought to be recovered, and it seems that the hay at least went into their partnership. Upon the facts reported he was fully justified in bringing this suit against the defendants, and in severing this part of the account from the rest sued for in the case against Stockwell alone. The jurisdiction may well be sustained upon another ground,—that the parties have by the reference created a tribunal of their own selection for the trial of the case and thereby waived the objection which might have been made to the jurisdiction. *Maxfield v. Scott*, 17 Vt. 634, is directly in point to sustain this doctrine. Especially should it be so held when by the terms of the reference the defendant agrees to interpose no motion to dismiss if the suit is tried by the referee. Such appears to have been the rule here.

Judgment affirmed.

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LEWIS S. EDDY v. SILAS DAVIS.

Evidence. Res Gesta. Declarations.

The plaintiff and defendant each claimed to be the owner of certain cattle.

The plaintiff claimed that W. bought them for him, as his agent, and with his money. The defendant insisted that W. bought the cattle for himself, with his own money, and sold them to the defendant. The plaintiff introduced evidence to show that he employed W. and another agent to drive the cattle to a pasture, hired jointly by himself and W., and that he directed them to call, as they went along, upon the owner of the pasture, and there brand the cattle with the initial of the latter's name; and that they did as he directed them; the cattle thus branded comprising the ones in controversy, and also a larger number belonging to the plaintiff, and not in dispute. The defendant claimed that the cattle were thus branded merely to show, if any of them strayed away, that they belonged to that pasture; and offered evidence to prove that while W. and the plaintiff's agent were branding the cattle, W. pointed out the cattle in suit and said that they belonged to him, and that the others belonged to the plaintiff; *Held*, that the plaintiff's evidence as to the branding of the cattle having been admitted, the evidence offered by the defendant of W.'s declaration made at the time of the branding was admissible as part of the *res gesta*, to rebut the inference that the cattle were recognized as the property of the plaintiff by the act of branding them according to his directions and as the cattle admitted to be his were then marked.

Held, also, that if the court had instructed the jury that they should reject from consideration the whole transaction of driving the cattle to the pasture and branding them, as not tending to prove ownership either in the plaintiff or W., then the defendant could not have complained of the exclusion of the declarations made by W., at the time of the branding.

REPLEVIN for seven cattle. Plea not guilty and trial by jury at the April Term, 1860,—REDFIELD, Ch. J., presiding.

It appeared in the course of the trial that in the winter of 1858-9, the plaintiff and one Wright formed some kind of a connection in the business of purchasing and marketing cattle, both having been employed in the business before that time on separate account. The arrangement between them was, as claimed by the plaintiff, that the plaintiff should furnish all the money to make the purchases and own all the cattle, and that Wright should have no control or interest in the business except as an agent, to be compensated for his services by half of the profits. The plaintiff further claimed that the cattle in controversy were

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purchased by Wright with the money of the plaintiff, under this arrangement.

The defendant had a private debt against Wright, and bought the cattle in question of him in payment of the debt. The defendant claimed that Wright was a partner with the plaintiff in the general business of buying and selling cattle, and that in regard to the cattle in suit, Wright was the sole owner of them, having paid for them with his own money, and purchased them on his own account ; and having bought one of them (the one for which the plaintiff failed to obtain a verdict) previous to the above mentioned arrangement with the plaintiff.

The cattle were all in a pasture in the town of Mount Holly at the time of the transfer by Wright to the defendant. It appeared by all the testimony in the case that the plaintiff and Wright hired this pasture jointly of one Gideon M. Lee for the season. The plaintiff claimed that the pasture was hired for the purpose, chiefly, of carrying on the joint business of himself and Wright, but that if they had not cattle enough on joint account to fill the pasture, he might put in his own cattle. Wright's account of the matter was that the pasture was hired for the purpose of pasturing an equal number of the separate cattle of each, and that in accordance with this understanding he put in the cattle in controversy on his own separate account, and the plaintiff put in his separate cattle to balance them. The plaintiff and Wright agreed in their testimony that the plaintiff put in a number of cattle of his own ; and the plaintiff claimed and testified that the cattle in suit were his in the manner before stated ; that he employed Wright, as above mentioned, to purchase, and with the assistance of another agent of his, one Wilder, to drive them up from Chester to Mount Holly and put them in the pasture, and directed them to call at Lee's and mark them as they went up, by branding the initials "G. M. L." with the brand of the owner of the pasture, which was accordingly done.

Wright testified that the cattle in suit were bought by him with his own money ; that the plaintiff understood they were his (Wright's) cattle ; that the plaintiff sent up a larger number of his own cattle at the same time in charge of Wilder, and that

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they called at Lee's and put his brand upon all the cattle, so that if any of them strayed out of the pasture they could be identified as cattle belonging to that pasture.

The court had held, during the whole trial, with the acquiescence of the counsel on both sides, that the mere declarations of Wright in regard to the partnership, or to the title of the property in dispute, were not evidence, unless made in the presence of the plaintiff, or brought to his knowledge, and as part of some transaction which was evidence.

The defendant then offered to show, by Lee, that at the time Wright and Wilder were marking the cattle, all alike, Wright pointed out to him the seven cattle in question, and said that they belonged to him, and that the others, except one pair of oxen, belonged to the plaintiff. To this the plaintiff objected, as being nothing but Wright's naked declaration. The defendant claimed it as a part of the transaction of marking, and therefore admissible.

The court being unable to see how the transaction of marking the cattle had any legal tendency to prove the issues before the jury; or if it had, how this statement of Wright in regard to his ownership of these cattle, had any connection with the transaction then in progress, and regarding its only force as tending to corroborate his testimony by his declarations out of court, and that its force depended altogether on the credit due to Wright's veracity under the circumstances, ruled out the evidence offered, to which the defendant excepted.

The minutes of the county court taken upon the trial, were made part of the case, but it is unnecessary, under the opinion, to set them forth. The verdict and judgment were for the plaintiff for six of the cattle in question.

A. Stoddard, for the defendant.

C. B. Eddy and Stoughton & Grant, for the plaintiff.

ALDIS J. The rule of law that the declarations of a party are admissible as evidence, when and only when they are a part of the *res gesta*, is one of the most difficult in practical applica-

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tion. The declarations must be connected with some transaction which is admissible in evidence, and must be made at the time, and must serve to explain, modify, or give character to the transaction. To determine upon the proper application of the rule to the case at bar, it is necessary to consider what the transaction was in connection with which the declarations here excluded were made—whether it was admissible as evidence, and upon what grounds, and whether the declarations serve to modify or affect the inferences which may properly be drawn from the transaction.

The question in dispute was whether six cattle belonged to the plaintiff or the defendant. Each claimed them. The plaintiff offered evidence to show that he employed Wright as his agent to buy the cattle for him. The defendant claimed that Wright bought the cattle for himself, and with his own money, and sold them to the defendant. The plaintiff offered evidence to show that he employed Wright with another agent of his, one Wilder, to drive the cattle up from Chester to Mount Holly, and put them in a pasture hired jointly by himself and Wright, and that he (the plaintiff) directed Wright and Wilder to call as they went to the pasture at G. M. Lee's, and there brand the cattle with the letters G. M. L., the initials of Mr. Lee, of whom the pasture was hired, and that they did as he directed;—that the cattle thus driven to pasture and branded, comprised the six in dispute, and a larger number of his own, about which there was no dispute. Now the acts thus proven were clearly acts of ownership—the exercise of dominion over the property—such as the owners of cattle usually exercise over their own, but do not presume to use with cattle belonging to others. The marking of cattle, either with one's initials, or with any other mark which might serve to identify them, is clearly evidence to prove ownership. If all this was done by the authority of the plaintiff, it was evidence in his favor. If Wright assisted in this whole transaction—if he marked the cattle which he claimed with the same mark which the plaintiff had directed to have put on his, and turned them into the same pasture and said nothing to indicate that he claimed to own them, the natural inference which one would draw from the transaction, would be that all the cat-

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tle belonged to one person—and that the plaintiff. But if at the time he was thus using the same mark which the plaintiff had appropriated for his cattle, he had told those who aided in the marking that the six cattle were his and not the plaintiff's, and especially if he said this in the presence of the agent of the plaintiff (Wilder)—it seems to us that it is a declaration which most materially affects the character of the act done, and the natural inferences to be drawn from it. It rebuts the idea that the cattle were by the act of marking recognized as being the property of the plaintiff—and tends to show that they were not all alike, though marked alike, but that the marking was as to the six cattle by his authority.

The court excluded the evidence that Wright, while he and Wilder were branding the cattle, pointed out the six cattle, and said that they belonged to him, and that the others belonged to the plaintiff. Now this was material for the defendant to rebut the inference naturally to be drawn from their being all marked with the mark which the plaintiff had directed, and which was used upon those which were admitted to belong to the plaintiff, that they all belonged to the plaintiff. It was material too, as strengthening Wright's evidence that the mark was used to show, if any of the cattle strayed away, that they belonged to the pasture. We think it should have been admitted.

It is urged that this evidence was not used by the plaintiff to show that he owned the cattle—but only to identify them as the cattle taken from the pasture by the defendant. If the court had given this instruction to the jury—that they should reject the whole transaction of driving the cattle to the pasture, and branding them, as not tending to prove ownership in either the plaintiff or Wright, then the defendant could not complain of the exclusion of the declaration made by Wright; as that was admissible only to rebut inferences which might, without that, be erroneously drawn from the transaction, that he thereby recognized the property to be the plaintiff's. The whole being excluded by the court, that part of it which favored the defendant would be immaterial. But the court does not appear to have done so.

The testimony offered by the plaintiff was admitted. Unless the court instructed the jury to reject it, they would treat it as

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evidence in the case. Upon examining the minutes of the charge (which are quite meagre) we are unable to find that he gave any directions to the jury in regard to this evidence. The reasons which the court state in the bill of exceptions, as having influenced them in excluding the declaration of Wright, do not appear to have been given as instructions to the jury ; and even if they had been, they seem to result from an impression upon the mind of the court that the act of branding was to be taken by itself alone and disconnected with the alleged previous directions of the plaintiff : and that in this view the marking of the cattle did not tend to show that either the plaintiff or Wright owned them. This we think was an erroneous view of the evidence, and one which the jury would not have taken, unless expressly directed to do so. We are not able to find that any such direction was given. Without such direction they would consider the marking as an act done by the direction of the plaintiff, and thus evincing his ownership ;—not the mere marking of initials, which of themselves applied neither to the plaintiff or to Wright, and therefore did not tend to prove ownership in either, and which was to be considered as an isolated act, deriving no significance from the plaintiff's previous orders. We have not thought it necessary to review the decisions to which counsel have referred us. They all agree in the statement of the general principle. But it is in the application of the principle to facts that the difficulty lies, and upon this subject each case stands so much upon its own facts, that it furnishes but little aid either in the illustration or application of the principle to any other. The opinion of the court in 9 Cushing 36, states with perspicuity the general rule, and has most appropriate remarks upon the difficulty which attends its application, and the singular differences of opinion among eminent judges in determining in particular cases the admissibility of such evidence. None of the cases cited by counsel seem to resemble the case at bar so far as to assist us in solving the question here presented. As we think the evidence improperly excluded, we reverse the judgment, and remand the case for a new trial.

Judgment reversed.

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J. D. BRADLEY v. AARON PIKE.

Evidence. Contract.

The defendant executed a promissory note in consideration of the payee's agreeing, by a written contract made coterminously with the note and as part of the same transaction, to give up to the defendant his contracts for furnishing cloth boards to certain manufacturing companies, "for the term of two years;" but the contracts to be given up were not definitely described in the written agreement. The defendant's evidence, introduced in defence to a suit upon the note tended to show that the payee had at the time, in fact, no contracts with the companies which he could give up, and that the note was therefore without consideration, and fraudulently procured. The plaintiff offered to show, by *parol*, that he had contracted with the companies to furnish them a certain amount of cloth boards,—to one company "within a reasonable time" and to the other at a specified time which had elapsed when the note was given; that although he had not performed the contracts in time, yet that the companies were still willing, at the time the note was given him by the defendant, to receive the boards of him: and further offered to prove various facts to show that the defendant must have known the situation of these contracts when he gave the note, and to show that the parties in their written agreement, executed with the note, referred to these contracts as the ones to be given up by the payee; *Held*, that this evidence was admissible to identify the contracts referred to in the written agreement executed coterminously with the note.

Held, also, that the plaintiff's evidence, tending as it did to show that the companies were still willing to receive the cloth boards at the time of the agreement between the defendant and payee of the note, did not show contracts so past and abandoned to prevent the proper use of the words "contracts" in describing them; that they still existed in a sense which might prove advantageous to the defendant, and so that he might naturally refer to them by that term, even though it might be doubtful whether he could legally enforce them.

The phrase "for the term of two years" in the written agreement of the payee to the defendant, *held* not a description of the contracts to be given up, but as indicating the period during which the payee of the note was to retire in the defendant's favor from the business of furnishing cloth boards to the companies.

ASSUMPSIT on a promissory note for \$82.00, made by the defendant March 30th, 1854, payable to one Wm. S. Bennett or bearer on the 15th day of July, 1854, and endorsed by the payee.

The case was referred and the referee reported the following facts:— This action was brought in the name of J. D. Bradley

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for the sole purpose of collection, Wm S. Bennett, the payee, being the owner of the note in suit and the only person in interest. At the time the note was given by the defendant to Bennett, and as part of the same transaction Bennett made and delivered to the defendant a written agreement referring to the note in question, which was as follows:

"An agreement by and between Wm. S. Bennett of the first part, and A. Pike, of Searsburgh, of the second part aforesaid, that Wm. Bennett agrees to give up his contract at the Bay State mills at Lawrence, which he says he gets ten dollars and fifty cents per thousand for five inch cloth boards, also twelve dollars for seven inch. also his contract at Middlesex mills in Lowell, which he says is ten dollars and fifty cents for five inch and twelve dollars and fifty cents for seven inch, for the term of two years, for the following described note, given March 30, 1854, for the amount of eighty-two dollars payable the 15th of July, 1854." (Signed) "WM. S. BENNETT."

The referee further found that when the note was given. Bennett had no contract with those mills, except an order for forty thousand boards from the Bay State mills, and for twenty-five thousand from the Middlesex mills, and that there remained only twelve to fifteen thousand boards to be supplied on the twenty-five thousand order; that the defendant went to the mills in June, 1854, and they refused to receive any boards upon any contract with Bennett; that the Middlesex mills after much solicitation received about ten thousand boards which the defendant then had with him, but refused to take any more, and at the same time the Bay State mills refused to take any boards and declined to recognize any contract with Bennett; that at this time the defendant had at home thirty thousand boards which he has not been able to dispose of.

The referee further found that Bennett had for several years previous to April, 1854, been furnishing five and seven inch cloth boards to the Middlesex and Bay State mills under a parol contract, to be paid ten dollars and fifty cents per thousand for five inch boards and twelve dollars per thousand for seven inch boards; and the plaintiff offered to prove, before the referee, by the testimony of Bennett, that in September, 1853, he contracted

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with the Middlesex mills to deliver to them, in a reasonable time, twenty-five thousand five inch cloth boards for which they were to pay him ten dollars and fifty cents per thousand; also, that in October, 1853, he made a contract with the Bay State mills, to deliver to them twenty thousand five inch and twenty thousand seven inch cloth boards by the 10th of December, 1853, for which they were to pay him ten dollars and fifty cents and twelve dollars per thousand respectively; that in February and in March, 1854, he had not fulfilled either of these contracts, but that in each of those months the mills were willing to receive the boards under the contracts. Also the plaintiff offered to prove in the same connection, by a written contract to that effect, that in April, 1853, one Davenport agreed to furnish Bennett with fifty thousand cloth boards in November, 1853, and fifty thousand in May, 1854, one half of them five, and the other half seven inches in width, for eight dollars and fifty cents per thousand; and further to prove by a written contract to that effect that the defendant entered into an agreement with Davenport for the delivery of the same quantity of boards at the same time, place and price; that the defendant did not fulfill his contract with Davenport, (only two thousand poor boards being delivered as stated below) and consequently Davenport could not fulfill his with Bennett, nor Bennett with the mills; that on the 5th day of February, 1854, the defendant and Davenport met Bennett at Brattleboro for the purpose of arranging the matter of damages for the non-delivery of the boards by the defendant to Davenport and by Davenport to Bennett. The plaintiff also offered to prove by the written contract to that effect that at this meeting it was agreed that Bennett should discharge Davenport from his contract and give up his (Bennett's) contract with the mills to the defendant and one Corse, and that the defendant and Corse should pay Bennett one hundred and twenty-five dollars; and that part of the consideration of the note in suit was this discharge of the defendant from his contract to deliver the boards.

To the admission of this evidence so offered by the plaintiff, or any part of it, the defendant objected; the objection was overruled and the evidence admitted; and the referee found and reported the facts substantially as above offered to be proved. The

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referee found that about two thousand poor boards were furnished to Bennett by the defendant and Davenport under their contracts to deliver him boards, which Bennett disposed of to the mills about the 1st of March, 1854, and a few days afterwards told the defendant what he had done; that the value of these boards was taken from the one hundred and twenty-five dollars above mentioned, and the note in suit was given for the balance.

The referee reported the sum of one hundred and five dollars and twelve cents due upon the note and found the plaintiff entitled to recover that amount.

The county court at the September Term, 1859, REDFIELD, Ch. J., presiding, rendered judgment upon the foregoing report for the plaintiff, to which the defendant excepted.

Davenport & Haskins, for the defendant.

Bradley & Kellogg for the plaintiff.

ALDIS J. The note in suit was given at the time that the plaintiff executed the agreement of March 30, 1854, and in consideration of the plaintiff's thereby agreeing to give up to the defendant his contracts for cloth boards with the Bay State mills at Lawrence and the Middlesex mills at Lowell, Mass.

The defendant's evidence tended to show that there were no contracts at all between the plaintiff and the mills which the plaintiff could give up—and so a total failure of consideration and fraud.

The plaintiff offered to show by parol, that in September, 1853, he contracted with the Middlesex mills to deliver them twenty-five thousand cloth boards; and in October, 1853, he contracted with the Bay State mills to deliver them forty thousand cloth boards by the 10th of December, 1853; and that although he had not performed these contracts, yet the mills were willing to receive the cloth boards of him in March, when he agreed to give up his contracts with the mills to the defendant; that the defendant must have known the situation of these contracts when he gave the note; and various circumstances growing out of the relation of the parties to each other, and of their dealings with

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each other and the mills, to show that the parties, by their agreement of March 30, 1854, must have referred to these contracts as those which were to be given up. Is this evidence so contradictory to the agreement of March 30, 1854, or variant from it, as to be inadmissible?

The agreement refers to the contracts to be given up in very general terms—specifying only the mills with which they were made and the prices which the plaintiff said he was to get by them for cloth boards. Whether the contracts were by parol or in writing—when made—for what amounts, for what period of time, when to be performed—and any other conditions and terms which might form a part of them, are not mentioned in this agreement. It is obvious that to identify the contracts so to be given up, resort must be had to parol testimony. Any parol evidence tending to show what the contracts were which were meant, would therefore be admissible—so long as it did not conflict with the description given in the agreement. The word “contracts” should be understood in its popular sense, as applicable to any understanding between the plaintiff and the mills by which they understood that he was to deliver, and they to receive, cloth boards, at the prices named in the agreement. The evidence of the plaintiff tended to show a contract with the mills upon which they were still willing to receive cloth boards. If upon his claim of the then existing state of these contracts, he had acted and taken cloth boards to the mill companies, it is reasonable to believe that they would have received them. Whether he could have compelled them to receive them, or not, does not appear. If there had been a forfeiture on his part which they were willing to waive upon his proceeding to perform in the future, such a state of things in regard to his contracts with them would still entitle them in ordinary language to be called contracts. We think therefore, the evidence did not show contracts so past and abandoned as to prevent the proper use of that word in describing them; and that the contracts still existed in a sense which might prove advantageous to the defendant, and so that he would naturally refer to them by that term even though it might be doubtful whether he could legally enforce them.

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The phrase "for the term of two years," we do not understand as descriptive of the c ntracts to be given up, and as meaning that they are to be in force for that time for the defendant's benefit ; but as indicating the period during which he is to retire from the furnishing of cloth boards to the mills, and give up to the defendant the privilege of furnishing them. If this construction could be deemed doubtful upon the words of the agreement—the parol evidence clearly shows that to have been the intention of the parties.

As therefore we do not find the parol evidence conflicting with or changing the sense of the written agreement, but only showing to what it was intended to apply—explaining and identifying the subject matter of it by the attending circumstances—it was admissible upon familiar principles of law. It is unnecessary therefore to consider whether it was admissible upon the other grounds urged by the plaintiff.

Judgment affirmed.

LOREN P HARRIS v. ASHER HAYNES.

Mortgage. Fixtures. Trespass.

As between a mortgagee and a vendee of the mortgagor with notice, *held* that a steam engine, boiler, the arch mouth in front of the boiler and the iron plate under the boiler, which furnished the motive power for a machine shop, together with the shafts and pulleys connected with the engine, were fixtures.

A mortgagee after condition broken is entitled to possession of the premises, and may maintain trespass *qua. clau.* for an injury thereto.

On the facts reported by the referee, *held* that it did not sufficiently appear that the breach of the condition was before the alleged trespass and thereupon the report was recommitted.

At a subsequent time the referee having reported that the breach of the condition was prior to the alleged trespass, the court gave judgment for the plaintiff for the value of the engine, arch mouth, and iron plate and the shafting and pulleys.

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This is an action of trespass, *quare clausum fregit*, for breaking and entering a certain carriage shop, and breaking, taking down, and carrying away certain articles of property, a list of which is given in the report of the referee hereinafter printed. The case was referred by agreement of parties and the referee made the following report :

Lucius M. Harris, a brother to the plaintiff, being the owner of the equity of redemption, and in possession of certain premises, mortgaged the same to the plaintiff by deed on the 13th day of September, 1855, with a carriage shop thereon, and all the tools, fixtures, and machinery in said shop, subject to the conditions mentioned in said deed, and said deed was recorded in the town clerk's office, in said Wilmington, where the lands conveyed were situated, on the same day it was executed. At the time of the execution of said mortgage, the plaintiff had signed notes with said Lucius M., and as surety for him, to the amount of one thousand dollars, which he subsequently paid, and no part of the same has been repaid to him. The defendant previous to the execution of the bill of sale and lease, hereinafter mentioned, and executed by said Lucius M. to the defendant, knew of said mortgage and conversed with the plaintiff in reference to the same a short time before the execution thereof.

On the third of May, 1856, the said Lucius M. Harris, being indebted to the defendant, executed to him a bill of sale and a lease of a portion of the premises conveyed by said mortgage, including the carriage shop, as collateral security.

Previous to the 10th day of September, 1857, and on or about the first day of that month, the defendant entered the carriage shop, removed therefrom one steam engine, two boilers used for generating steam to propel the engine, an iron arch mouth upon which the front end of the boilers rested, and an iron grate upon which the wood was laid for heating the boilers, the main horizontal shaft used for propelling the machinery and two smaller ones, two stoves and pipe used for warming the shop, one turning lathe, circular saws and arbors, one grindstone, and a quantity of belting, all of which he claimed under, and by virtue of said bill of sale. Said articles are all specified in said bill of sale unless the boilers may be regarded as an exception and is the same property described in the plaintiff's declaration.

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There was annexed to the main shop, on the west end, a building twenty-three feet long by eight feet in width, which was erected for the express purpose of accomodating the boilers, and in which the chimney, brick-work, and boilers were placed. The rafters of this building were mitered to the main shop and spiked to it, but it was in no other way framed or attached thereto.

The boilers were set in brick work, the front ends rested upon a cast iron arch mouth, which was purchased with the boilers and accompanied them, the other end penetrated the chimney. The brick was laid up around the boilers at the sides something more than half way, so that in removing them it became necessary to remove one or two tiers of brick from one side, and I find that the brick work was damaged to the amount of three dollars in the removal of the boilers, but no unnecessary injury was done. If the plaintiff is entitled to recover therefor from the facts reported, I find him entitled to said sum of three dollars.

There was a hole where wood was taken in, in the end of the small building, but not large enough to pass the boilers through; and to get them out of the building one or two boards were taken off and replaced so as not to injure the building. This was the most convenient and prudent way of getting the boilers out of the building.

The boilers were connected to the engine by two pipes, a water and steam pipe, of cast iron, passing through the west end of the main shop and confined both to the boilers and engine by means of flanges and bolts; and so arranged that by unscrewing the nuts from the bolts the bolts could be taken out and the pipes easily removed from either or both.

Two upright posts and a sill or bed piece resting upon the floor in the main shop, constituted the frame into which the engine was placed and from which the defendant removed it. The posts were fastened at the top by planks into which notches were cut so as to fit the posts, and the planks were spiked to the joists overhead. The posts were placed in these notches in such a way as to secure the top, and the bottoms were attached to the sill or bed piece, and they were not otherwise fastened to the building.

The engine rested on the sill, and was fastened to it by a bolt which passed up through the sill, and a flange upon the bottom

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and foot of the engine, with a nut screwed on to the bolt so as to fasten the engine firmly. It was removed by unscrewing the nuts and raising it from the bolts.

The regulator to the engine was placed in a frame back of the engine frame and so fastened that it could be removed by displacing a bolt, and that was removed without otherwise disturbing any thing in the building and without injury thereto.

The turning lathe was upon a frame, the legs of which set upon the floor, and was confined by an upright piece of slit work the foot of which stood upon a table or frame, and the top braced or confined to the floor above, and made sufficiently tight to secure the lathe without any other fastening. It does not appear to have been otherwise fastened to the building.

The circular saws taken were confined in tables, fastened to their place in the manner of the lathe, and so confined in the table that by removing a key the arbor and saw could be taken out without injury to the table or building.

Hangers were framed or bolted to the joists over head, and cast iron boxes were attached to the hangers by the use of bolts. The defendant unscrewed the nuts from the bolts, and took them out, and by so doing removed the boxes and the shafting, without otherwise disturbing the hangers or building. The grindstone was not fastened to the building. There was no damage done to the main shop or any of its fixtures, by the removal of the machinery therefrom.

The main shop was built by the said Lucius M. Harris about two years previous to the time when the engine was procured, and was used for a carriage shop, without either steam or water power. After the introduction of steam it was used for other purposes.

The defendant took possession of said shop under his lease, on the 3d of May, 1856, and occupied the same together with the property sued for, during the continuance of said lease.

At the expiration of said lease, the defendant surrendered his possession of the premises leased and the property declared for to said Lucius M. Harris, who continued in possession until January, 1858.

The plaintiff did not foreclose his mortgage or take possession of the premises under the same, until January, 1858.

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Lucius M Harris was not indebted to the plaintiff at the time of the execution of the plaintiff's mortgage, nor was the plaintiff liable for debts of said Lucius. except upon the notes signed by him as before stated, and it does not appear that he is under any additional liability for said Lucius M., at the present time; or that said Lucius M., is indebted to him except for the money and interest paid upon said notes, amounting to about one thousand dollars.

At the time of the commencement of this suit, the plaintiff had paid on such note five hundred dollars. and upon another two hundred dollars. The balance of his liability has been paid by him since.

On the 15th day of May, 1858, Lucius M. Harris executed a quit claim deed of the premises, mortgaged to the plaintiff, to the defendant.

The court at the April Term, 1859, REDFIELD. Ch. J., presiding, rendered judgment *pro forma*, on the foregoing report, for the plaintiff to which the defendant excepted.

Davenport & Haskins, for the defendant.

C. K. Field and *D. Kellogg*, for the plaintiff.

KELLOGG, J. This is an action of trespass *qu. claus. et de bonis aspor.*, with a count in trover joined under the statute. The controversy in the case involves the rights of the parties respectively in certain articles of property which the plaintiff claims as fixtures, or in the nature of fixtures, constituting a part of the realty of a certain carriage shop in Wilmington, and which the defendant claims as personal chattels. Both parties derive their title or right to these articles from Lucius M. Harris, a brother of the plaintiff,—the plaintiff by a mortgage deed, dated 13th November, 1855, and the defendant by a bill of sale dated 3d of May, 1856; and it is conceded that if the articles sued for were fixtures, or so annexed to the realty as to have become essentially merged in or incorporated with it, they passed to the plaintiff by the mortgage deed, and, on the other hand, that if they are to be considered as retaining their character and iden-

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tity as personal chattels, notwithstanding their annexation to the realty, they passed to the defendant by the bill of sale. No question is made respecting the entry, severance, and asportation alleged in the declaration, and the defence rests upon a justification by the defendant of the acts complained of, under and by virtue of the bill of sale.

The law of the subject of fixtures having been elaborately considered and discussed by this court in three recent cases, *Hill v. Wentworth*, 28 Vt. 428. *Fullam et al v. Stearns et al*, 30 Vt. 443, and *Bartlett v. Wood and Trustees*, 32 Vt. 372, the case is to be determined by the rules and tendency of the decisions in those cases, and does not call for a discussion of the principles recognized and settled as rules of property in reference to articles of this character by those decisions. It is sufficient to say that the leading principle resulting from those decisions is that actual annexation to the freehold, and adaptation to its purposes, is not sufficient to convert chattels into fixtures, unless they are fastened in such a manner as to show an intention to incorporate them firmly with the inheritance, and that if articles of machinery, used in a factory for manufacturing purposes, are only attached to the building to keep them steady and in their place, so that their use as chattels may be more beneficial, and are attached in such a way that they can be removed without any essential injury to the freehold, or to the articles themselves, they still remain personal property. The application of this principle to the facts reported by the referee in this case determines the character of the lathe, arbors, and saws, the grindstone, the belting, and the stove and pipe to be that of personal chattels; and, as the plaintiff took no possession of these articles before they were removed from the shop by the defendant, they are to be considered as having passed to the defendant by virtue of the bill of sale,—he having the superior right by virtue of his priority of possession,—and this character was given to each of these articles, when affixed to the building in a similar manner, and employed in similar uses, in the case of *Bartlett v. Wood and Trustees*, above referred to. The controversy in this case is therefore reduced to the determination of the character of the

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remaining articles, viz: the engine and the boilers, the arch-mouth upon which the front ends of the boilers rested, and the iron grate upon which the wood was laid under the boilers, and the shafts and pulleys attached to or connected with the engine,—these being the only other articles in respect to which the plaintiff claims damages in his declaration,—and the question to be decided is whether these articles should also be considered as personal chattels, or should be treated as fixtures and a part of the realty. In view of the facts reported, it is obvious that these articles were so connected with each other in reference to the object and purpose of their annexation, and their adaptation to the use of the shop, that the same rule of decision is applicable to each alike.

The report of the referee states that the main shop was built about two years previous to the time when the engine was procured, and was used for a carriage shop or factory, without either steam or water power, and that, after the introduction of steam power, it was used for other purposes, and the machinery in the shop was propelled by motive power supplied from the engine and applied by means of the shafts and pulleys connected with it. We find nothing in the case in reference to the mode and extent of the annexation of the engine to the realty which is inconsistent with its character either as a chattel or as a fixture, and the determination of its character in this case must rest on the object and purpose of the annexation. In the case of *Winslow et al. v. Merchants' Insurance Co.*, 4 Metc. 306, a steam engine and boilers, placed in a building designed for the manufacture of steam engines and other heavy iron work, and furnishing the motive power to the machinery used in the building, were, with the machinery adapted to be used by such engine by means of connecting bands and other gearing, held to be fixtures, or in the nature of fixtures. The principle of this case is recognized and adopted in *Hill v. Wentworth ubi supra*, in which it was held by this court that the iron shafting put up in a paper mill for the purpose of turning and putting in motion the machinery by means of hangers of iron bolted to the beams and sills of the building, was a constituent part of the mill, on the ground

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that the shafting was necessary to communicate the motive power to the machinery, and should be regarded as much a part of the mill as a water wheel would be, if water applied by means of it furnished the motive power of the mill. We regard the principle thus settled in the case of *Hill v. Wentworth* as applicable to and decisive of the subject matter now under consideration, and understanding from the facts reported in this case the object and purpose of the annexation of the engine and its adjuncts to the realty to have been the furnishing of motive power to the machinery of the shop, and having reference to the manner in which they were fitted and adapted to the shop and the business there carried on, we are of opinion that the engine and boilers, the arch mouth and grate, and the shafting and pulleys, should be regarded as fixtures and parcel of the realty. *Richardson v. Copeland*, 6 Gray 536.

The question then arises, whether, on the facts reported, the plaintiff can recover of the defendant, in this action, for entering the shop and taking down and carrying away these articles, on either of the counts in trespass or on the count in trover. This question must depend upon the plaintiff's right to the property at the time of the alleged trespass and conversion. The action of trespass *quare clausum fregit* is founded on possession, and not on the right of property; yet, in this State, the possession, in a case where there is no adverse holding is considered as following the property, and is deemed to be in him who has the legal seizin or title; and the owner is enabled by such a constructive possession to maintain trespass, unless the injury is done to a tenant in actual possession. *Robinson v. Douglass*, 2 Aiken 364. But an action of trespass cannot be supported without an actual or constructive possession of the property by the plaintiff at the time when the injury was committed; and so, in order to support trover, the plaintiff must, at the time of the conversion, have had a property in the chattel, either general or special, with the actual possession, or the right to immediate possession. In this State, the mortgagee is regarded as having no right of entry until the condition of the mortgage is broken, (*Wilson v. Hooper & Downer*, 13 Vt. 653; *Lull v. Matthews*, 19 Vt. 322; *Wright & Ainsworth v. Lake*, 30 Vt. 206,) and, until condition broken, the

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mortgage is treated as being only a lien upon, and not a title in or to, the land, and the mortgagor may, until the happening of that event, retain the possession of the land even as against the mortgagee. Before such breach, the interest of the mortgagee is contingent, and may be defeated by the payment of the money secured by the mortgage according to the condition. After condition broken, the mortgagee becomes at law the absolute owner of the estate, and is entitled to the immediate possession, and this right to the immediate possession of the estate has, in our courts, been regarded as sufficient to support the action of trespass. In Massachusetts, a mortgagee not in actual possession may, after condition broken, maintain trespass against the mortgagor for cutting and carrying away to market timber trees standing on the premises. *Page v. Robinson, et al.* 10 Cush. 99.

The plaintiff's action must therefore rest for its support exclusively on the ground of an injury to his possession or right of immediate possession of the mortgaged premises existing at the time of the injury complained of, and it cannot be sustained on any other ground. The plaintiff was not in the actual possession of the property conveyed by the mortgage at the time of the alleged trespass and conversion by the defendant,—the shop being then in the possession of the mortgagor,—and he did not take actual possession of the premises, or foreclose his mortgage, until January, 1858, which was several months afterwards. As he was not in the actual possession of the mortgaged premises at the time when the alleged injury was committed, he must show affirmatively that, before or at that time, the condition of the mortgage was broken, so that he then had the right of immediate possession of the premises; and the time when the condition of the mortgage was broken thus becomes the material point in the case. The referee's report states that the entry, severance, asportation, and conversion complained of were one continuous act by the defendant, which was done "previous to the 10th day of September, 1857, and on or about the 1st day of said month," and that the shop was then in possession of the mortgagor. This suit was commenced on the 22d day of September, 1857, and it appears from the report of the referee that, at that time, the plaintiff had paid on notes which he had

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signed as surety for the mortgagor the sum of seven hundred dollars, and that since the commencement of the suit, he has paid the balance of his liabilities on the same notes as such surety. We have no doubt that the condition of the mortgage covers and secures the indebtedness from the mortgagor to the plaintiff on account of the payment so made by the plaintiff as surety for the mortgagor upon those notes; but, clearly, there was no breach of that condition until those payments were in fact made. The referee only finds that, at the time of the commencement of the suit the plaintiff had paid seven hundred dollars on those notes, as above mentioned, and that there was no other liability from the mortgagor to the plaintiff, except that arising from those notes, then existing;—but, in respect to the time when the payment of the seven hundred dollars on those notes was in fact made by the plaintiff, the referee furnishes no other means of determining, except the statement that the plaintiff had paid the same “at the time of commencement of the suit,” and a statement that the plaintiff paid the whole amount of these notes subsequently to the execution of the mortgage, and it does not appear whether the notes were due at the time when either payment was made. For aught that appears in the referee’s report, the payment of the seven hundred dollars which was the only payment made before the commencement of the suit might not have been made in fact until after the trespass and conversion by the defendant which is alleged as the ground of the present action. A breach of the condition of the mortgage, existing at the time when the injury, of which the plaintiff complains, was committed, being essential to the support of this action, it should appear affirmatively, and we cannot supply that fact by an intendment or inference which might be contrary to the truth of the case. As the facts reported only show a breach of the condition of the mortgage existing at the time of the commencement of the suit, and do not show that the breach existed at the time when the injury was committed, we cannot consider the plaintiff’s right to the immediate possession of the mortgaged premises at the time of the alleged trespass and conversion as being either clearly or satisfactorily established.

In this situation of the case, we think that the report of the

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referee ought to be re-committed to him for the purpose of ascertaining, upon the evidence already taken, or upon such evidence as may be introduced by the parties, whether the condition of the mortgage was broken before or at the time of the committing of the alleged trespass and conversion, as this is the point upon which the plaintiff's action must turn. The judgment of the county court in favor of the plaintiff is therefore reversed, and the report is ordered to be re-committed to the referee accordingly.

At the Windham County Supreme Court, February term, 1862, the referee made a further report in this cause, finding and setting forth therein, in addition to the facts previously reported by him, that the condition of the mortgage was broken before the time when the trespass complained of in the plaintiff's declaration was committed. The court thereupon rendered a judgment in this cause in favor of the plaintiff for the value of the engine, boilers, arch-mouth and grate, and shafting and pulleys, and for the damage to the brick work in removing the boilers, as reported by the referee, together with interest thereon from 1st September, 1857, the time of taking and converting said property, as damages.

SANDFORD PLUMB v. OLIVER NILES.

Contract.

The plaintiff was the owner and holder of a note payable to A. or bearer, and had a suit pending thereon against the defendant. The defendant had a note against A. at the same time. The plaintiff promised the defendant, if he would give a new note to the plaintiff for the one then in suit, he would show the defendant property belonging to A. sufficient to secure the note

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the defendant held against A. Thereupon the defendant gave the plaintiff a new note for the one then in suit. This action was upon the new note. *Held* the failure of the plaintiff to show the defendant property whereupon to secure his note against A., was no defence to this suit, as the promises, though mutual, were independent, and each party could have an action on such promise without proving performance on his part.

This was an action on a promissory note. The cause was referred, and the referee reported as follows :

"The plaintiff gave in evidence a promissory note signed by the defendant, bearing date December 8, 1855, for the sum of forty-nine dollars and eighty-nine cents, payable on demand with interest, and there rested the case.

The defendant resisted the plaintiff's claim and proved the following facts by way of defence :

That in January, 1843, the said Niles on settlement with one Ozias S. Plumb, found himself indebted to him in the sum of twenty-six dollars, for which sum Niles gave him his promissory note dated 24th of January, 1843, for the sum of twenty-six dollars, payable on demand with interest. It further appeared in evidence that in the winter or spring of 1843, Niles purchased of one David Boardman a promissory note which Boardman held against Plumb, for the sum of about sixty-two dollars, and that immediately after the purchase of said note, Niles gave notice to Plumb, that he held said sixty-two dollar note, and that Plumb, soon after such notice, promised Niles that the sixty-two dollar note should apply on the said twenty-six dollar note, which Niles had executed to Plumb, but Plumb assigned as a reason for not doing it then that the said twenty-six dollar note was then in the possession of one Sanford Plumb. It further appeared in evidence that some time during the year 1843, Ozias S. Plumb having become embarrassed in his circumstances and his credit impaired, passed the said twenty-six dollar note of said Niles and some other notes, into the hands of Sanford Plumb, to indemnify him for certain liabilities he was to incur for the said Ozias S., and that the said Sanford Plumb thereupon purchased certain goods for the said Ozias, of one Williston, and in payment for the same turned over to the said Williston the said twenty-six dollar note against said Niles, and that said Williston

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called upon said Niles for payment of said note who declined paying the same, and thereupon the said Williston returned said note to said Sandford Plumb; that in the fall of 1848, Niles commenced a suit against Ozias S. Plumb upon the said sixty-two dollar note, before Justice French, which was continued by said Justice from time to time until April, 1849, when the said suit was abandoned. It further appeared the 28th day of May, 1849, the said Niles and Ozias S. Plumb agreed as follows, that the said Niles would give up to the said Ozias the sixty-two dollar note and the said Ozias S. would deliver up to said Niles the said twenty-six dollar note, and that thereupon the said Niles delivered up to said Ozias S. the sixty-two dollar note and the said Ozias S. Plumb then drew and delivered to said Niles, an order upon Sandford Plumb to deliver to said Niles the twenty-six dollar note. The order was received, however, subject to objection of the plaintiff, also the evidence that the said Niles and Ozias S. Plumb agreed upon a surrendering up of the notes as above stated, was received subject to the plaintiff's objection. It further appeared that the said Niles, some time after the execution of the order above mentioned, presented the same to said Sandford Plumb who declined delivering up said twenty-six dollar note, saying the same belonged to him, said Sandford; that in the spring of 1850, and about the month of April, the twenty-six dollar note remaining unpaid to the said Sandford, he commenced a suit upon it against the said Niles, and the same was made returnable before Nicholas Clark, Justice of the Peace, and on the return day of the writ the said Niles and said Sandford Plumb met before said Justice Clark. Niles wanted a continuance, but Justice Clark advised a settlement, whereupon the said Sandford Plumb proposed to the said Niles if he would give the said Sandford a new note for the amount of the said twenty-six dollar note, he, said Sandford, would show him property of the said Ozias S. Plumb, sufficient to satisfy his the said Niles' claim against the said Ozias S., which proposition of the said Sandford the said Niles accepted, and then and there executed to the said Sandford his note dated April 22d, 1850, for the amount of the twenty-six dollar note which was then delivered up to said Niles. The costs of the suit before Justice Clark

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were not claimed but given up. It further appeared, and I so find, that after the execution of the said note of the 22d of April, 1850, to said Sandford, the said Niles applied to said Sandford to show him property of said Ozias S. Plumb, upon which he might secure his demand against said Ozias S. It did not appear that the said Sandford pointed out any particular property of said Ozias S. to said Niles, but replied, "Get your writ against Ozias S. and I will show you property." This application was repeated by Niles and a similar reply from said Sandford returned. But it was proved at the hearing, and so I find the fact, that at the time Niles executed the note of the 22d of April, 1850, to said Sanford, the said Ozias S. was living upon the Bascomb farm, so-called, in W hitingham, and that while he lived upon said farm he owned and had a horse and wagon there and some neat cattle there, and that in April, 1851, Ozias S. owned and had in his possession on said Bascomb farm and subject to attachment, stock to the value of one hundred and twenty dollars which was then attached by a creditor of said Ozias S. It further appeared that on the 8th of December, 1855, the said Sandford called upon the said Niles, and informed him that his note of the date of the 22d of April, 1850, was nearly outlawed, and requested him to renew it ; and the said Niles then took up the former note and executed therefor the note now in suit, being for the sum of forty-nine dollars and eighty-nine cents (\$49.89). The defendant claimed at the hearing that this last note was made and executed to the plaintiff upon the same terms as the former note of the 22d of April, 1850, but the referee did not find any satisfactory proof that the plaintiff upon the occasion of the execution of the last note gave any assurances or promise that he would show to Niles any property of the said Ozias S. whatever, but the said Niles testified that *he understood* and expected when he signed the note in suit that it was to be held on the same terms as the previous note. In the year 1856, the plaintiff sent his son to the defendant, with a message to call for the payment of the note in suit, that the son communicated the message to the defendant, who replied to him that he would pay it soon, and upon the messenger's return, he informed the plaintiff of Niles' reply.

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It further appeared that when the plaintiff took back from Williston the twenty-six dollar note of Niles, he paid Williston the amount thereof in money, and that the property of Ozias S. Plumb, which was attached in 1851, he procured to be receipted, and the same was not removed from the farm, and that during all the time said Ozias S. lived upon the Bascomb farm, he owned personal property to some extent, which was not excepted from attachment.

The result is that upon the foregoing facts, I think, the plaintiff is entitled to recover of the defendant the amount of the promissory note declared upon in this suit, and I do therefore find for the plaintiff to recover of the defendant the sum of sixty-four dollars and nineteen cents, being the amount of said note and interest, and his costs, subject however to the opinion of the court upon the case above stated."

The Court, REDFIELD, Ch. J., presiding, at the September Term, 1860, rendered judgment on the within report for the plaintiff for \$64.19, to which the defendants excepted.

H. N. Hix, for the defendant.

Davenport & Haskins, for the plaintiff.

KELLOGG, J. The defence in this suit proceeds on the ground that the note in suit was given in substitution for another note executed by the defendant to the plaintiff on the 24th April, 1850, on the settlement of a suit commenced by the plaintiff against the defendant on a note executed by the defendant to Ozias S. Plumb on the 24th January, 1843, and that the neglect of the plaintiff to perform his undertaking, made at the time of the execution of the note dated 24th April, 1850, as stated in the referee's report, viz: that if the defendant would execute that note, he, the plaintiff, would show him property of the said Ozias S. Plumb sufficient to satisfy the defendant's claim against said Ozias—constituted an entire failure of the consideration of that note, and that the note in suit, being executed in substitution for that note, had no consideration to support it.

Whether the defendant could have successfully defended the

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suit which was settled by the note executed on the 24th April, 1850, or not, is a question which it is not necessary to determine, as the settlement of the suit, and the surrender to the defendant of the note upon which it was predicated, furnished a sufficient consideration for the execution of the note dated 24th April, 1850. But we think that it is clear, on the facts reported by the referee, that the undertaking of the plaintiff to show to the defendant property of Ozias S. Plumb sufficient to satisfy the defendant's claim against said Ozias, was an independent contract or promise, and that, though the note and this undertaking were mutual contracts or promises entered into by the parties at the same time, each party has his remedy on the promise in his favor, without performing his part of the contract. In this view of the case, the defence cannot be supported. No other question being made on behalf of the defendant, the judgment of the county court in favor of the plaintiff is affirmed.

ASAPH KNAPP v. TOWN OF MARLBORO.***Covenant. Judgment. Estoppel. Voucher.***

When a covenantor is vouched in to defend an action of ejectment by a third person against his covenantee, the judgment in the action of ejectment is conclusive as to all matters therein adjudicated, in a subsequent action between the covenantor and covenantee.

To sustain an action for breach of a covenant for quiet enjoyment, it is necessary for the plaintiff to prove that he was evicted by a person who had a lawful and paramount title existing before or at the time of the defendant's covenant, as the covenant for quiet enjoyment applies only to the acts of those claiming title and to rights existing at the time it is entered into.

The plaintiff and his grantors had been in possession of the premises in controversy for more than half a century and he was then evicted by a third person; Held in an action against his covenantor, that such long continued possession raised a conclusive presumption that he was not evicted by title paramount.

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This was an action of covenant broken. Plea, the general issue and general pleas in bar—trial by jury.

The plaintiff gave in evidence the charter of the town of Marlboro, dated April 27, 1751, showing one right reserved to the use of schools; also, a plan of the town, showing that said right was allotted as right No. 57, and that said right was and is situated in the northwest corner of said town. It also appeared that said right No. 57 was and is bounded on the north by the town of Dover. The plaintiff further offered in evidence a copy of a lease from the selectmen of Marlboro to Jonathan Rising, dated April 6, 1795, accompanied with evidence tending to show that the description in said lease covered the north half of said right No. 57.

The plaintiff then gave evidence to show that Rising went into possession of the premises described in his deed or lease, soon after its execution, and that he and his said several grantees or lessees occupied under their respective deeds down to the plaintiff, and paid rent to the town, agreeably to the stipulations of the Rising lease.

The plaintiff's evidence tended to show that he took possession of the fifty acres in the northwest corner of the school right in April, 1834, and from that time down to his eviction, in the suit of Gillett *v.* himself, he occupied said fifty acres, and paid rents to the town, and the amount so paid.

The plaintiff then gave in evidence a copy of the record of a judgment rendered by the county court in an action of ejectment, Oliver Gillett *v.* him, April Term, 1853, with the writ of possession issued upon said judgment, and the officer's return thereon, accompanied with proof tending to show that the town of Marlboro was vouched in to defend said action.

The plaintiff then offered to prove that the true north line of Marlboro as it was chartered, and the true north line of the school right, was situated twelve rods north of the southern boundary of the lands from which the plaintiff was evicted in the suit of Gillett *v.* him.

To this the defendant objected upon the ground that as the town of Marlboro had been vouched in to defend the suit of Gillett *v.* Knapp, parol evidence was not admissible to contradict

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the record in said suit, by showing that Gillett recovered lands of the plaintiff lying in the town of Marlboro, the same being described in said record as bounded on the south by the south line of Dover, Dover being the town next north of Marlboro.

The county court, at September term, 1859, REDFIELD, Ch. J., presiding, held and so decided, that all these facts being established, the plaintiff could not recover, because if the defendants were vouched in to defend Gillett's suit, they were to be regarded as privy to it, and it would be conclusive upon them, and also conclusive upon the plaintiff, as to the grounds upon which it was rendered, and the facts found by the jury, and therefore the land being, as to these parties, found to be in Dover, there was no eviction from any of the land leased. And in this view of the case, it was not competent for the plaintiff to escape from the effect of the finding in the case of Gillett, by now showing that the land was in fact in the town of Marlboro.

And the court further held that if that proof was admissible in the case, as it would be, if the jury should fail to be satisfied of the fact that the defendants were vouched in to defend Gillett's suit then the plaintiff could not recover, inasmuch as this proof would show that the defendants had kept their covenants, there being no controversy in the case, that the land leased did extend to the line of Marlboro, and that the defendants had good title to the school right in town, and good right to lease the same in the manner they did, and to lease the land in controversy if it was a part and parcel of such right, and that it would be so if situate in the town of Marlboro.

Verdict for the defendant. Exceptions by the plaintiff.

Stroughton & Grant, for the plaintiff.

P. T. Washburn, for the defendant.

KELLOGG, J. The town of Marlboro, the party defendant in this suit, conveyed to one Jonathan Rising, by a lease executed by its selectmen on the 6th April, 1795, a lot of land, duly allotted to the right for the support of schools, which was situated

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in town, and bounded on the north by the north line of the town. The plaintiff, who occupied a portion of that lot abutting on the north line of the town under conveyances transferring to him the title thereto which was conveyed by this lease to Rising, brought the present action against the town for the breach of the covenant in the lease for quiet enjoyment, alleging an eviction by one Oliver Gillett, by a lawful and paramount title established by a judgment recovered in favor of Gillett against him in an action of ejectment.

This cause has been before this court on two former occasions. On the hearing in 1857, upon exceptions taken by the defendant, (29 Vt. 282.) it was held that the lease from the town of Marlboro to Rising, under whom the plaintiff derived his title, contained a covenant for quiet enjoyment—that by the terms of the lease the covenant only applied to land situated in the town of Marlboro, and could not be extended by parol evidence to include land lying north of the north line of Marlboro, or in the adjoining town of Dover; and that the covenant ran with the land, and inured to the benefit of the plaintiff. In the opinion of the court, delivered by ISHAM, J., it is said:—"Two things are rendered certain by this lease: the whole of the land was in the town of Marlboro, and was bounded on the north by the north line of that town. That being the extent of the lease, the inquiry arises, has the plaintiff shown that he was evicted from any land in that town which is included in the lease. On this point the case seems fatally defective for the plaintiff. * * The jury should have been instructed, agreeably to the requests on the part of the defendant, that the lease conveyed land only in Marlboro, and that the dispossession being only of land in Dover, the plaintiff had not been disturbed in the enjoyment of land conveyed by the lease." The conclusions adopted by the court resulted in the reversal of the judgment of the county court on a verdict for the plaintiff, and the cause was remanded to that court for a new trial, which resulted in a verdict for the defendant. On that trial the plaintiff introduced in evidence the record of the judgment of eviction against him in the action of ejectment in favor of Gillett, but it appeared, *prima facie*, only to cover land situated

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in the town of Dover, and bounded on the south by the north line of the town of Marlboro. To prove an eviction from a portion of the premises described in the lease, the plaintiff offered to show that the true north line of the town of Marlboro was twelve rods further north than such north line as established by the judgment in the suit in favor of Gillett against him. This evidence so offered by the plaintiff, was objected to by the defendant and excluded. To the decision excluding this evidence the plaintiff excepted; and he thereupon submitted to a verdict against him. On the hearing upon the plaintiff's exceptions to the exclusion of this evidence in this court in 1859, (*vide* 31 Vt. 674,) it was held that the judgment in favor of Gillett against the plaintiff was not conclusive, either for or against the town of Marlboro, as it did not appear that this town was a party to the action or suit in which that judgment was rendered, or that it was made privy thereto by being cited in to defend the action, and, therefore, that the evidence was admissible. This result led to the reversal of the judgment for the defendant, and a new or third trial in the county court. On this third trial, the plaintiff, to prove that the eviction was from lands covered by the lease, offered in evidence the copy of the record of the judgment rendered in the action of ejectment in favor of Gillett against him, with the writ of possession issued on said judgment and the officer's return thereon of the execution of the same, and also *with proof that the defendant in this suit was vouched in to defend that suit*, and neglected and failed to do so, and that he, the plaintiff, thereupon made the best defence he could in that suit, but failed to satisfy the jury before whom the case was tried that the land from which he was evicted was in the town of Marlboro, and that he was defeated in the suit on account of such failure, the jury finding a verdict in favor of Gillett because they found from the proof in the case that the land in dispute was in the town of Dover, and also with the further proof that the true north line of the town of Marlboro, as established by the charter of that town, was situated twelve rods north of the southern boundary of the lands from which the plaintiff was evicted by the judgment in the suit of Gillett against him. The county court excluded the evidence so offered, and held that if all the facts so offered in evidence were established, the plain-

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tiff could not recover, for the reason that if the town of Marlboro was vouched in to defend the suit of Gillett, it should be regarded as privy to that suit, and the judgment would be conclusive, both upon the town and the plaintiff, as to the grounds upon which it was rendered and the facts found by the jury; and, therefore, the land in dispute being, as to these parties, found to be in Dover, there was no eviction from any of the land leased to Rising, and, in this view of the case, it would not be competent for the plaintiff to escape from the effect of the finding and judgment in the suit of Gillett by now showing that the land was in fact situated in the town of Marlboro. And the county court also held that if the proof so offered was admissible, (as it would be if the jury should fail to be satisfied of the fact that the town of Marlboro was vouched in to defend the suit of Gillett,) then the plaintiff could not recover, inasmuch as this proof would show that the town of Marlboro had kept its covenant—it being conceded that the land conveyed by the lease extended to the north line of that town, and that said town had a good title to the land so leased, (it being a lot reserved in the charter, and duly allotted, to the right for the support of schools in said town,) and was authorized to lease the same in the manner in which it was leased, and, particularly to lease the land in controversy as a part of such school right, which it would be if it was situated within the town of Marlboro. There being no other ground on which the plaintiff claimed a recovery in this action, a verdict was directed for the defendant, and the plaintiff excepted to the decision of the county court excluding the evidence so offered, and also to the rulings by that court in respect to the same. The question now to be considered is, whether there was any error in this decision, and in the rulings of the county court.

To sustain this action, it is necessary that the plaintiff should state in his declaration, in some manner, and prove that the person by whom he was evicted had a lawful and paramount title to the premises existing before or at the time of the execution of the defendant's conveyance, as the covenant for quiet enjoyment applies merely to the acts of those claiming by title, and to rights existing at the time it was entered into. *Wotton v. Hele*, 2 Saund. 177, and Sergeant Williams' note (10,) to that case. *Kelly*

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v. *The Dutch Church of Schenectady*, 2 Hill 105. *Hayes v. Bickerstaff*, Vaughan 118. The bill of exceptions states that it was a part of the plaintiff's proof, on the trial, that Rising went into possession of the school lot, conveyed in the lease to him, soon after the execution of the lease, and that he and his successive grantees or lessees occupied the same premises, under their respective deeds, down to the plaintiff, paying rent to the town agreeably to the stipulations of the original lease, and that the plaintiff took possession of the fifty acres situated in the north-west corner of that lot, which included the land in controversy, in April, 1834, and from that time to the time of his eviction in the suit of Gillett against him (April Term, 1853,) he occupied the fifty acres, paying rents to the town as aforesaid. These facts would seem necessarily to raise a conclusive presumption that Gillett did not in fact recover any land in Marlboro by virtue of a title paramount to that which was conveyed to Rising by the lease from the defendant, and that if in fact he did recover land in Marlboro which was conveyed by the lease, as the plaintiff offered to show, it must have been by a title which was derived subsequent to the conveyance by the lease, to which the defendant's covenant does not apply. *Somerville v. Hamilton*, 4 Wheat. 229. To show an eviction from the land as alleged in his declaration, the plaintiff offered in evidence the record of Gillett's recovery against him in the action of ejectment, with proof tending to show that the town of Marlboro was vouched in to defend that action. The record states the *situs* of the premises recovered by Gillett in that action as being in Dover; and it was admitted on the trial of the present suit that Gillett recovered in that action by proving the fact to the satisfaction of the jury who tried the case, that the land so recovered by him was situated in the town of Dover, and that the plaintiff was defeated in the same action because he failed to satisfy the jury that this land was situated in the town of Marlboro. The true location of the north line of the town of Marlboro, which was also the south line of the town of Dover, was therefore directly in issue in that action. It is a principle, long recognized and well settled, that when the covenantor is vouched in to defend a suit commenced against his covenantee for the recovery of premises to which his covenant is

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applicable, he becomes a privy to the action, and as such, he is as much concluded by the result of the action and as to every fact necessarily involved in or established by it as the parties themselves, and to this extent he is virtually a party to the suit. *Carpenter v. Pier*, 30 Vt. 81. *Knapp v. Marlboro*, 31 Vt. 674. The judgment is conclusive of every fact litigated on the trial which was necessary to the upholding of the judgment, and the estoppel is mutual and operates to the same extent upon both parties. As stated by ALDIS, J., when this case was last before this court—(31 Vt. 674)—“both must be bound by it, or neither;” and the judgment in the action of ejectment was then held not to be conclusive, as between the plaintiff and the defendant, on the ground that it did not then appear, as it does now, that the town of Marlboro was vouched in to defend that action. As to these parties, therefore, it was established by the judgment in the action of ejectment in favor of Gillett that the land in controversy was situated in the town of Dover, and not in the town of Marlboro, and that the plaintiff consequently was not, under or by virtue of that judgment, dispossessed of any land conveyed by the lease to Rising. In this view of the case, the plaintiff's offer to show that a part of his land in Marlboro, which was conveyed by the lease, was, in fact, included in the recovery by Gillett, was an offer to show a fact in direct contradiction to the record of the judgment in the suit in favor of Gillett against him, in respect to a point which clearly appears to have been involved in the issue in that suit, and determined by its result. We think that the county court properly held that it was not competent for the plaintiff thus to avoid the effect of the record.

But if the proof offered by the plaintiff that the land in dispute was in fact situated in the town of Marlboro was admissible, it would be fatal to the plaintiff's case. The record in the suit of Gillett against the plaintiff does not show the title under which the recovery in that suit was had, or that the title conveyed by the town of Marlboro to Rising was even in issue. Gillett might in fact have recovered his judgment under a right or title derived subsequent to that conveyance, for which the defendant would not be responsible. The plaintiff must show on what ground Gillett succeeded in that suit, to give any application or effect to the

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record. This could be done only by evidence *dehors* the record. If, in doing this, the plaintiff establishes as a necessary part of his case the fact that the land in controversy was situated in Marlboro, this is a virtual admission on his part that the defendant's title was a good title; for it appears that the land leased to Rising belonged to the school right in the town of Marlboro, and extended to the north line of that town, and that the town of Marlboro had a good title to it, and a good right so to lease it at the time that lease was executed, and that, if the land in controversy was situated in that town, it was included in and conveyed by that lease. These facts would conclusively show that the plaintiff's averment that Gillett's recovery was by a paramount title to that conveyed by the defendant's lease was false, and that the defendant's covenant had not been broken. The case of *Kelly v. The Dutch Church in Schenectady*, *ubi supra*, is in point in reference to this part of the case.

The result of these views of the case is that the decisions of the county court were correct, and the judgment of that court in favor of the defendant is affirmed.

 CONGREGATIONAL SOCIETY OF HALIFAX v. JAMES L. STARK, *et al.*
Corporation. Deed. Construction. Church.

A deed to a corporation aggregate will convey a fee though the word "successors" is not used.

When the *habendum* clause in a deed is contradictory to the premises, it is void, but when it simply explains, limits or qualifies the premises, it performs its proper office.

A deed in the premises simply described the land by its boundaries. The *habendum* was "during the time the said society or their heirs shall meet on said land for public worship or have a meeting house standing on said land, and appropriate the use of the same to Congregational or Presbyterian public worship, *held* that when the grantees or their successors ceased to use the land for the purposes specified, it reverted to the grantor and his heirs.

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When it appeared that the original society, as such, had removed to another place, and ceased to meet on the land for public worship, but a minority of its members continued to meet there under a new organization and name, *held* that this removal operated as a forfeiture of the rights of the society under the first clause of the *habendum*, but that under the second clause of the *habendum* neither the original society nor one claiming under them, or by authority from them, would forfeit their right to the land so long as they or either of them should continue to keep a meeting house on said land and appropriate the use of the same to Congregational or Presbyterian public worship.

A forfeiture of the land under such circumstances, would not work a forfeiture of a stove put into the meeting house by the society.

This was an action of trespass brought by the plaintiffs against the defendants for forcibly breaking open and entering their meeting house, situate in Halifax, breaking the doors and locks attached to the same, and carrying away and converting to their own use a stove and pipe belonging to the plaintiffs, situate therein. To this, the defendants pleaded, first, not guilty—issue to the country.

Second. That there was no such corporation—verification.

Third. That said meeting house was the property of the defendant Stark, that he entered of his own right, and Barton as his servant—verification.

Fourth. That the close wherein the said meeting house is situate and appurtenant is the close, soil and freehold of the said Stark, that he was the owner of the house, stove and pipe, and entered with Barton as his servant—verification.

Fifth. That the close wherein said meeting house is situate and is appurtenant, was the close, soil and freehold of the estate of William McCrillis; that before the committing of the said trespasses, one Leonard Brown was appointed the administrator of McCrillis' estate, and that said trespasses were committed by the license of said Brown as administrator—verification.

The plaintiffs replied to the first plea similiter.

To the second that the plaintiffs were a corporation, organized according to chapter 81 of the Revised Statutes—verification.

To the third, that said meeting house was not the property of said Stark, and issue to the country.

To the fourth, that said close, soil and freehold, and said meet-

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ing house, stove and pipe, were not the property of said Stark, and issue to the country.

To the fifth, that said close, soil and freehold, and meeting house, stove and pipe were not the close, soil, and freehold and property of said McCrillis' estate, and issue to the country.

Rejoinder to the second replication to the country—to the third, fourth and fifth pleas similiter.

The plaintiffs introduced testimony tending to prove, that as far back as the memory of man, there had been a Congregational Church and Society in Halifax, which had built and *occupied* the meeting house in question as a place of worship, and owned and controlled the house; that the stove and pipe taken had been bought and placed in the house about thirty years ago by said society, and used by them for the purpose of warming the same, and had never been moved therefrom since they were first placed therein.

They also introduced testimony tending to prove that about the first of September, 1844, a majority of the society and church moved about two miles west from the place where the meeting house in question stood, which was called and known as the "Centre of Halifax" to a place called "Plumb Hollow," in said town, took with them the minister, communion service, pulpit, bible, and occupied a new meeting house that they had erected there, or which had been erected under their direction, and have continued to meet and occupy the same as a place of public worship until the present time:

That a considerable minority of said church and society who were members thereof at that time, refused to remove with the majority to "Plumb Hollow," aforesaid, but chose to remain and meet in the old place at the "Centre," and on the 26th of September, 1844, formed a new society, and called it the "Centre Congregational Society of Halifax," pursuant to chapter 81 of the Revised Statutes, have continued their organization as a corporation up to the present time, and are the plaintiffs in the present action.

The plaintiffs also put in evidence tending to show, that in November, 1844, the minority of the old church who had remained at the "Centre," and continued to worship, more or less

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at the old house, having requested the majority to consent to their being organized into a new church, and they having refused so to consent, a mutual "Ecclesiastical Council" was called by both parties, to meet in Halifax on November 19, 1844, for the purpose of considering the difficulties existing in said church, and to form a new church if deemed expedient; that said council met, heard the parties, decided that in their opinion the majority who had removed to the "Hollow" would be the original church and society in case of division, and appointed a committee of four members of the council, in case an amicable arrangement could not be effected, to have discretionary power with reference to "future action;" that said "committee of council" in pursuance of said "discretionary power," afterwards on the 26th day of December, 1844, constituted the said minority a Congregational Church, according to the rules of that denomination:

That on the 21st of December, 1844, the parties, majority and minority of the old society, agreed to refer the question of property owned by the original society to the committee of council aforesaid as referees, who met at that time and after hearing the parties awarded the meeting house, the land on which it stood, and the stove and pipe to the "Centre Congregational Society," the present plaintiffs, who were at that time worshipping in the old meeting house, and have ever since occupied and been in possession of the said house, stove and pipe, in the manner hereinafter stated, and were so in December, 1858, when the stove and pipe was taken and carried off by the defendants; that the stove and pipe were the same that were purchased by the original society and placed in the house by them; that the majority have never since that award occupied the house, used the stove, or claimed any right to the same; that about the 20th day of December, 1858, the defendants broke open the meeting house, and carried off the stove and pipe as alleged in the declaration; that the damage to the door and lock was about two dollars, and the value of the stove and pipe about eighteen dollars.

The plaintiffs further gave evidence tending to show that a new church was constituted on the 26th of December, A. D., 1844; that this new church was composed of members of the old church, who refused to remove with the majority to Plumb Hol-

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low, and that the members of said new church continued to occupy the meeting house in controversy for the purposes of public worship until about three years before the commencement of this suit. And it appeared by cross-examination of the plaintiffs' witnesses, (and about this point there was no controversy,) that no meeting for public worship had been held in the meeting house in controversy for a space of nearly three years previous to the commencement of this suit, and that but one religious meeting had been held therein for a period of nearly four years, and that there was not at the commencement of this suit a single male member of the Presbyterian or Congregational church resident in Halifax, who did not belong to the church now worshipping at West Halifax, but the plaintiff's evidence did tend to show that there were now living in Halifax six or eight females who belong to the new church organized in December, 1844, as hereinbefore stated.

The plaintiff further gave evidence tending to show, that there had been in the month of December, 1844, a reference or arbitration agreed upon by the old and new churches or societies, by which all differences pertaining to questions growing out of church property were to be settled, but there was no evidence given tending to show that the majority who removed to West Halifax, by vote of the society, ever authorized any submission or reference.

The plaintiffs then gave evidence bearing upon the question of damages, and rested their case.

The defendants then gave in evidence an office copy of a deed recited below, from William McCrillis to Halifax Society dated July 6th, 1782, and it was conceded that the meeting house in controversy stands upon the lands conveyed by said deed :

The records of the Congregational church and society of Halifax, and evidence of the proceedings of an ecclesiastical council convened at said Halifax, November 19th, 1844 ; also certain deeds of the premises in question from the heirs of William McCrillis to the defendant Stark.

At this stage of the case the counsel desired an intimation from the court in regard to the law governing the case, whereupon the court, REDFIELD, Ch. J., presiding, at September term, 1860, *pro forma* ruled that the heirs of McCrillis, the original grantor

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of the land on which the house stood, had a reversionary interest in the land, which passed to the defendant Stark by their deeds ; that the plaintiffs are not in any legal sense the successors of the grantees in the deed of McCrillis ; that consequently the house ceased to be occupied for the purposes specified in the deed when the old society erected a new house for public worship and removed to another part of the town, and that after so great a lapse of time it was competent for the defendants to enter the house and remove the stove and pipe in the manner the testimony tended to show. Whereupon a verdict passed for the defendants, and exceptions are allowed and execution stayed.

THE MC CRILLIS DEED.

HALIFAX, August ye 9th, 1790.

Know all Men by these Presents That I William Mc Crillis of Colerain in the County of Hampshire and State of Massachusetts Bay, yeoman, in consideration of the just sum of eight pounds lawful money to me in hand paid before the delivery hereof by Halitax society in the county of Windham and State of Vermont have released remised and quit claimed unto the said society of Halifax a certain tract of land laying in said Halifax and is a part of the original right No. twenty-nine and bounded as followeth. Beginning at the southwest corner of said right, thence running east ten degrees south thirty-two rods and from thence north ten degrees east twenty rods and from thence west ten degrees thirty-two rods to the west line of said right and from thence south ten degrees west twenty rods to the corner first mentioned, containing four acres of land—To have and to hold the above mentioned premises free of all incumbrances of whatsoever nature during the time the said society or their heirs shall meet on said land for publick worship or have a meeting house standing on said land and appropriate the use of the same to the Congregational or Presbyterian publick worship, and furthermore I the said William Mc Crillis do for myself my heirs, executors, administrators do covenant and engage the above demised premises to the above said society and their heirs during the time the above said society shall ~~associate~~ themselves together on said land for publick worship. In witness whereof I the said Wil-

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liam Mc Crillis do hereunto set my hand and seal this twenty-sixth day of July A. D. one thousand seven hundred and eighty-two and in the sixth year of our independence.

WILLIAM MC CRILLIS, [Seal.]

Signed sealed and delivered in presence of

HENRY HENDERSON,

POLLY HALL.

Windham County, ss. Halifax February 19th, 1788. Then personally appeared William Mc Crillis signer and sealer of the foregoing instrument and acknowledged the same to be his free act and deed. Before me,

BENJAMIN HENRY, Justice of the Peace.

Kellogg & Kirkland, for the plaintiffs.

Davenport & Haskins and *Bradley & Kellogg*, for the defendants.

ALDIS, J. It is true as claimed by the counsel for the plaintiffs that a deed to a corporation aggregate will convey a fee simple though the word "successor" is not used in the deed. As such a corporation never dies, it is immaterial whether such a deed is construed as granting to them an estate for life, or a fee, for in their case the one is the same as the other. Hence the deed of McCrillis to the Halifax society vested in them in fee simple the lands conveyed.

It is further claimed as a necessary consequence that the clause in the habendum of the deed is repugnant to the premises, and therefore void. The habendum is in these words:—"To have and to hold the premises during the time the said society or their heirs shall meet on said land for public worship, or have a meeting house standing on said land and appropriate the use of the same to the Congregational or Presbyterian public worship."

It is the proper office of the habendum to determine what estate or interest is granted by the deed, and to limit, qualify or explain the words used in the granting part of the deed. Where the estate or interest is set forth in the premises the habendum cannot by the use of words repugnant to such estate defeat it. Where therefore the habendum is contradictory to the premises, the habendum is void, and the words in the premises stand. Co.

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Litt. 21. 4 Cruise's Dig §76, p. 273. *Goodtitle v. Gibbs*, 5 B. and C. 709. 2 Bla. Com. 298. *Timmis v. Steele*, 4 Ad. and Ell 664. (45 E. C. L. 664.)

But where the habendum is not so contradictory to the premises, but only limits, explains or qualifies the words there used, it performs its proper office. It may lessen, enlarge, limit and qualify the use of the land conveyed so long as it does not defeat the estate granted.

Here the deed in the premises does not describe the estate or interest conveyed, but only the land by its name and boundaries. A deed to a corporation would describe them in the same way whatever was the estate conveyed, whether in fee or for life. Hence in such a deed the description of the estate or interest conveyed would naturally be, and ought to be, in the habendum. A deed to a natural person and his heirs necessarily causes a fee and not an estate for life—not so with a corporation. Hence this deed to them in the premises describes the land and not the estate or duration of the interest conveyed. The word successors is not used, still without it they may take a fee, and would if there were no limitation or description of a less estate in the following parts of the deed. But in a deed to a natural person the word "heirs" would carry a fee, and its absence would show a less estate for life. The habendum proceeds to explain the use which the grantee is to have of the land, and limit its extent and duration. It may be a fee simple, the use may last forever if the grantees see fit to occupy it for the purpose for which it is conveyed. There is no repugnancy between the premises and the habendum.

We do not deem it very material to decide whether the clause in the habendum shall be held to be a condition or a limitation. The clause in question well illustrates what is said in Sheppard's Touchstone, p. 121, that, "conditions at all times have in their drawing so much affinity with limitations that it is hard to discern and distinguish them." But the legal effect of this language clearly is, that when the grantees cease to meet on said land for public worship, and fail to have a meeting house on the land and to appropriate its use to Congregational or Presbyterian public worship, then their title ceases, and the grantor or his heirs may re-enter and hold the land.

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We think, therefore, that the county court was right in holding that the grantor and his heirs had a reversionary interest in the land, and that when the grantees ceased to comply with the terms and conditions upon which the land was granted to them and to use it as specified in the deed, then their right to the land expired, and the reversionary interest of the grantees came into operation as a present and absolute estate in fee.

II. This leads us to inquire what is the true construction of the condition, (if we may so call it,) in the habendum of the deed. It may be divided into two clauses, and is in these words: "To hold the premises during the time," (1st,) "the said society or their heirs shall meet on said land for public worship;" (2d,) "or have a meeting house standing on said land, and appropriate the use of the same to the Congregational or Presbyterian public worship.

Let us consider the meaning of the first clause. The words "their heirs" we think the same as their successors and mean their corporate successors. "The said society" must mean the grantees in the deed—the original Halifax society. They are to have and to hold the land "during the time"—equivalent to *only so long as* "the said society or their successors shall meet on said land for public worship." The grant clearly contemplated the confining of the use of the land to that particular Congregational society and for that particular use, public worship, and at that very place. "Meet on said land." Hence if any other society met on the land, or this society used it for other use and not for public worship, or this society abandoned meeting on this land for public worship though they continued to meet elsewhere, they forfeited their right to this land.

When therefore "the said society" went to West Halifax, built a meeting house there and met for public worship there, and ceased meeting "on said land for public worship," they no longer complied with the terms of this first clause of the condition. It is said that the minority of the original Halifax society who remained at East Halifax, who organized a new congregational society there, and occupied the meeting house for public worship, may be considered in law as the successors of the grantees in the deed. We think not. The terms of the deed are plain and

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explicit—"during the time the said society or their heirs shall meet on said land." "The said society" must receive a forced construction in order to include a new society, organized sixty years afterwards, and that too while the original society was in existence and capable of complying with the condition if it choose to do so. So "their heirs," meaning "their successors," must be fairly understood to mean corporate successors, to whom the legal existence and identity of the original corporation have been extended by succession. But this applies to those who now form the original society still organized and in full operation at West Halifax. It would be an anomaly in the law of corporations that a society could extend itself in the direct line of organization and succession and have a separate corporate existence through that channel, and yet by new organization under the statute bequeath a portion of its identity to another corporate body, and so beget another separate branch of successors. This privilege of begetting heirs is not yet conferred on artificial persons. The general objects of the two societies are the same, but that is not sufficient to give them legal identity or succession.

As it appears in the case that the original society removed wholly to West Halifax in 1844, and have ever since abandoned meeting on said land for public worship—removed indeed with the intent of meeting elsewhere to worship, and with no intent to return to meet there for worship, we think this was a forfeiture of their rights under this clause of the condition. This appears to have been the view taken of the case in the court below. The exceptions state, "the court ruled that the heirs of McCrillis had a reversionary interest in the land which passed to the defendants; that the plaintiffs are not in a legal sense the successors of the grantees in the McCrillis deed; that consequently the house ceased to be occupied for the purposes specified in the deed when the old society erected a new house for public worship and removed to another part of the town, and that after so great a lapse of time it was competent for the defendants to enter the house," &c. The court below construed the meaning of the *whole* condition to be that the original society must meet on the land for public worship. They do not appear to have considered that the society had any greater or other rights under the second clause of the

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condition than under the first. The second clause of the condition is, "or have a meeting house standing on the land and appropriate the use of the same to Congregational or Presbyterian public worship."

It is very obvious to us that this second clause of the condition was inserted in the deed with the intention of enlarging the rights of the grantees in the use of the land beyond the strict provisions of the first clause. It was the intention of the grantor to have Congregational public worship kept up in a meeting house on the land. This was the main object. This particular society might remove elsewhere and build a house of worship, (as they have since done,) but if they kept a meeting house on this land and appropriated it to Congregational worship the great purpose of the grant was secured. This is a more liberal and a more reasonable condition. It looks to the great end—the worship of God and the promoting of the cause of religion—it is consistent with what we may well presume to have been the spirit and religious sentiment of the grantor, and the purposes sought to be accomplished by the grantees.

In this view the grantees might authorize the plaintiffs to use the meeting house for Congregational public worship, and so long as they so used it, it was an appropriation of it according to the meaning of the second clause in the condition.

The award, (whatever may have been its exact legal effect between the parties,) the subsequent use by the plaintiffs, and the assent of the original society to such use, as shown by the evidence in the case, clearly prove that the old society authorized the new one to have the exclusive use and possession of the church; and the case shows that they so continued having public worship there till about three or four years before the defendants' entry upon the premises, and that they were in possession of the house at the time of such entry. While public worship was thus kept up by the plaintiffs there could have been no forfeiture.

Now this preservation of the rights of the grantees through the use of the house by the plaintiffs, is wholly ignored by the county court. They seem to have given to the second clause of the condition the same construction and meaning as the first. In this we think there was error.

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It is said by the defendants that even if there was no forfeiture till the plaintiffs ceased to worship there, yet as the case shows that all public worship had ceased for three years before the defendants' entry ; that there had been only one meeting in four years ; that all the male members of the new society, and all but six or eight of the female members had joined the society at West Halifax, these facts created a forfeiture by operation of law so as to justify the defendants entry. We think we should not be justified in holding that these facts as matter of law would work a forfeiture. There may be circumstances to explain this cessation of religious services, to show that there were reasonable causes for it, and that there was not only no intent to abandon public worship there, but that there are just grounds of believing that it will soon be revived and firmly re-established. It is a question of fact, under proper instructions, whether there has been such an intentional abandonment, or such a long and unreasonable non-user of the house for public worship as would work a forfeiture. It must depend upon the circumstances of the case. The length of time during which there has been no public worship would be an important element, the small number of worshippers, their connection with the old society, and their worshipping there, the causes of the discontinuance of worship and the means of sustaining it, and the reasonable grounds of belief that it will or will not be revived, these and other facts, which no court can anticipate, may be shown as tending to prove that there has or has not been a forfeiture. The instructions to the jury must be adapted to the case as it shall appear from the evidence on the trial.

As to the stove and pipe. These were articles of personal property belonging to the old society, and the evidence seemed to establish that by the award and what would seem to be the subsequent assent of the old society, they were given to and transferred to the exclusive possession of the new society. A forfeiture of the house would not work any forfeiture of the stove. It would still be personal property, and belong to the plaintiffs. As the case must be remanded for a new trial upon the question of the forfeiture of the land, and as our decision settles the question of the right to the stove, we do not deem it necessary to set-

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tle the questions that arise as to the effect of this decision in regard to the right to the stove upon the case under the pleadings as they now stand. We may remark, however, that as the breaking of the close is the gist of the action, and the taking of the stove only matter of aggravation, and so not properly traversable, proof under the general issue, and perhaps also under the plea of *liberum tenementum*, that would sustain the defendants right to the close would defeat the action, though the stove belongs to the plaintiff. But there is a peculiarity in the pleadings which may perhaps affect the result. The defendant in his fourth plea alleges that the close was the freehold of the defendant, and that he was the *owner* of the meeting house and of the stove and pipe. If the plea had only been *liberum tenementum*, the plaintiffs might if they saw fit, have now assigned the taking of the stove. But as the defendant has seen fit to allege in his plea title to the stove, may not this averment and offer of issue upon a point which it was not necessary for him to plead, relieve the plaintiff from the necessity of any new assignment on that point, and make this by his joinder of issue a material and issuable question. What then would be the result? There is one plea that the close is the freehold of the defendant, and upon that there might be a verdict for the defendant; there is another that the stove is the property of the defendant, and upon that, (if the allegation is held material and the issue the same as if upon a new assignment,) there must be a verdict for the plaintiffs. In the event of such verdicts—one for the plaintiff upon one issue, and another for the defendant upon another issue—what should be the judgment? It is not necessary for us, however, to do more than suggest to counsel the difficulties which may attend the case in the present state of pleadings, growing out of our decision as to the plaintiffs' right to the stove. The result of our decision upon the main question is, that the judgment must be reversed and the case remanded.

Judgment reversed.

Bartlett and wife v. Boyd.

LOEL BARTLETT *et ux.* v. WARREN BOYD.

Mortgage. Chancery. Practice. Town Clerk. Evidence.

When two mortgages on the same property, one in favor of the husband and one in favor of his wife, were joined in the same petition for foreclosure, held that the objection of misjoinder not being taken by plea, answer or demurrer, must be considered as waived.

When a mortgage is held and owned by the wife as her *separate property*, the husband cannot properly be joined as a co-plaintiff to foreclose it, but the objection should be taken by demurrer, and if not so taken, it cannot be insisted upon at the hearing.

A warranty deed by the husband does not estop the wife from enforcing a prior mortgage on the same property held by her as her separate property against the husband's grantee, and those holding under him.

The certificate of a town clerk on a deed, of the time when it was received into his office, pursuant to the statute, (Comp. Stat., pp. 117, 118,) is only *prima facie* evidence of the facts recited in the certificate, and may be contradicted by parol proof.

This was a petition to foreclose three mortgages on the same property. Answer and traverse.

The case was referred, and the facts presented for the consideration of the court sufficiently appear in the referee's report.

The referee reported that Alvah E. Hill and wife, Sarah S. Hill, mortgaged the premises in question to one Chloe Robinson, by deed, bearing date August 13, 1853, to secure the payment of a note of \$100, with interest annually, which said mortgage was duly recorded December 19, 1853—said mortgage was afterwards assigned to Anthony Stetson, and by him afterwards assigned to Loel Bartlett, on the 27th day of May, 1856.

The said Alvah E. Hill and wife, on the 17th of July, 1855, mortgaged the same premises to Harriet M. Bartlett, then and now the wife of Loel Bartlett, and one of the petitioners, to secure the payment of a promissory note of \$215, with annual interest, which said mortgage deed was duly recorded the 23d day of July, 1855.

On the 9th day of March, 1857, Loel Bartlett, by his deed of warranty, conveyed the premises in question to one Thomas Ghostling, which deed was duly recorded the 10th day of March, 1857.

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Joseph Eames conveyed the same premises by quit claim deed to said Loel Bartlett, said deed being executed the 4th day of March, 1857, and acknowledged, delivered and recorded the 30th day of June, 1857. It appearing that Alvah E. Hill had previously thereto conveyed the said premises by quit claim deed to Eames.

The referee also finds that Thomas Ghostling on the 9th day of March, 1857, executed and delivered to Loel Bartlett a mortgage deed of the same premises, to secure the payment of five promissory notes. Said deed, with the certificate of the town clerk of Searsburgh thereon, purports to have been recorded the 9th day of March, 1857.

Thomas Ghostling on the 9th day of July, 1857, by quit claim deed, conveyed the same premises to one Aaron Pike, and on the same day Aaron Pike conveyed the same premises to Warren Boyd, the defendant.

The defendant objected to the admission of the mortgage deed from Hill and wife to Chloe Robinson—said mortgage deed was admitted as evidence by the referee as herein before reported.

The defendant also objected to the admission of the mortgage deed from Alvah E. Hill and wife to Harriet M. Bartlett, the same however was admitted as evidence by the referee.

The defendant offered to prove that the mortgage deed from Ghostling to Bartlett was never recorded until February, 1858, nor left in the town clerk's office for record until some time in December, 1857; that Bartlett took his mortgage from the town clerk's office the day it was executed, saying he did not want it recorded until he got a title from Eames; that Bartlett in December, 1857, brought the mortgage to the town clerk of Searsburgh, and fraudulently procured the town clerk to make a certificate that said mortgage was received for record and recorded March 9, 1857, and further that when he took a deed from Pike, the Ghostling mortgage to Bartlett was not on record or on file. He also offered to prove by the original record of deeds that the mortgage was not recorded until February, 1858.

Which offer of the defendant was objected to by the petitioners, and the objection overruled.

The referee found that the mortgage deed from Ghostling to Bartlett was executed and delivered March 9, 1857, and left in

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the town clerk's office for record some time in December, 1857, but not recorded until the last of February, 1858.

The referee further found that when the deeds from Ghostling to Pike and from Pike to Boyd were executed and recorded on the 9th day of July, 1857, the mortgage deed from Ghostling to Bartlett was not on record or on file in the town clerk's office in Searsburgh.

There was no evidence offered tending to prove fraud or collusion between said Bartlett and the town clerk of Searsburgh, whereby the certificate of such town clerk was endorsed upon the Ghostling mortgage to Bartlett, purporting that said mortgage was recorded March 9, 1857. And there was no evidence tending to show that Boyd knew of the existence of the Ghostling mortgage when he took his deed from Pike.

The counsel for the petitioners at the conclusion of the hearing before the referee abandoned all claim for a recovery upon the mortgage deed and note from Alvah E. Hill and wife to Chloe Robinson, dated August 13, 1853, but insisted that the petitioners were entitled to a decree in equity by reason of the mortgage deed from Alvah E. Hill and wife to Harriet M. Bartlett, dated July 17, 1855, and the mortgage deed from Thomas Ghostling to Loel Bartlett, dated March 9, 1857.

On the foregoing facts, BARRETT, chancellor, at ——— term, 1860, dismissed the petition. The petitioners appealed.

Flagg & Tyler, for the petitioners.

Davenport & Haskins, for the defendants.

KELLOGG, J. This is a suit by petition in chancery for the foreclosure of three certain mortgages. After answer and traverse, the cause was referred to a referee to ascertain and report the facts in respect to the points at issue, and those facts appear in his report. The petitioners having by their counsel abandoned, at the hearing before the referee, all claim for a foreclosure upon the mortgage from Alvah E. Hill and his wife to Chloe Robinson, set forth and described in the petition, the questions made in the case are limited to the claim of the petitioners for a

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foreclosure in this suit on the other two mortgages described and set forth in their petition, one of which was executed by said Hill and his wife on the 17th July, 1855, to Harriet M. Bartlett, one of the petitioners, she being then and still the wife of Loel Bartlett, the other petitioner, and the other of which was executed by Thomas Ghostling on the 9th of March, 1857, to said Loel Bartlett. It appeared that on the same 9th of March, 1857, the said Loel Bartlett conveyed the mortgaged premises, which are situated in the town of Searsburg, to said Ghostling by a deed of warranty with the usual covenants, and that previous to this conveyance the said Hill and wife had conveyed their interest in the mortgaged premises to Joseph Eames, and that said Eames had conveyed the same to the said Loel Bartlett. On the 9th of July, 1857, Ghostling conveyed the said premises to Aaron Pike, who on the same day conveyed the same to the defendant.

I. The first question which arises in the case is whether the petitioners are entitled to a decree of foreclosure on the mortgage executed by Hill and wife to the petitioner Harriet M. Bartlett. It is claimed on the part of the defendant that the two mortgages which are now sought to be foreclosed—one being executed to the wife and the other to the husband—could not properly be joined in the same petition. An objection like this, if not raised upon the pleadings, will, in general, not be regarded when made at the hearing, and in this case the defendant not having stated the objection in his answer, nor by demurrer or plea, so as to have given the petitioners an opportunity to apply for leave to amend their petition, we think that it ought not now to affect the cause. Story's Eq. Pl., §271, 544, and notes. The defendant further claims that as he has title to the mortgaged premises by virtue of a conveyance from Ghostling, executed on the 9th of July, 1857, which is stated in the report of the referee, the petitioners are estopped, as to him, by the covenants in the warranty deed from Loel Bartlett to Ghostling, which was executed on the 9th of March, 1857, from asserting any right of foreclosure on this mortgage, executed to the petitioner, Harriet M. Bartlett, inasmuch as it was in force and outstanding at the date of her husband's deed to Ghostling; but we think that the estoppel claimed could only apply to an outstanding incumbrance arising from a

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mortgage which the husband held in his own right at the time of his conveyance to Ghostling, and that it cannot be set up against the separate right of the wife, or have any effect upon property held in her separate right. She was not a party to the covenants contained in the deed from her husband to Ghostling, and ought not to be bound by them when the effect would be to deprive her of the enjoyment of her separate property. In the case of *Stearns v. Stearns*, 30 Vt. 213, it was held that the fact that a note is made payable to a married woman during coverture, and is expressed to be for value received, (both of which conditions exist in the case of the note secured by the mortgage executed by Hill and wife to Harriet M. Bartlett,) imports, *prima facie*, that the consideration proceeded from her or her real or personal estate, and that if the consideration of a note so executed to a married woman consists of her property, or proceeds from her as the meritorious cause, it becomes her chose in action, which survives to her on the death of her husband, or passes to her administrator on her death, unless reduced to actual possession by the husband before her death. The cases of *Richardson v. Daggett*, 4 Vt. 336; *Driggs, administrator, v. Abbott*, 27 Vt. 580; *Holmes v. Holmes*, 28 Vt. 765, are decisive authorities on this point. There is nothing in this case to show that the husband ever reduced to possession the note secured by this mortgage, and the joining of his wife with himself as a party to this suit, so far from being evidence of an intention on his part to reduce this note to possession, would lead to a contrary conclusion. Treating this note, then, as the separate property of the wife, there can be no doubt that she may join with her husband in an action of law upon it. *Richardson v. Daggett*, 4 Vt. 336, per PHELPS, J., on p. 343-4. In Story's Eq. Pl., §63, it is said that in practice, where a suit in equity is brought by the wife for her separate property, the husband is sometimes made a co-plaintiff with her, "but this practice is incorrect, and in all such cases she ought to sue, as sole plaintiff, by her next friend, and the husband should be made a party defendant, for he may contest that it is her separate property, and the claim may be incompatible with his marital rights." The cases which recognize this rule, as stated by Judge Story, proceed on the ground that where the husband and wife

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join in the suit as co-plaintiffs, or answer as co-defendants, it is to be considered as the suit or defence of the husband alone, and that the wife would not be bound by a suit instituted by her husband, and that such a suit would not prejudice a future claim by the wife in respect of her separate estate, and that not only ought the wife to be protected in the enjoyment of her separate estate, but the parties also who are sued ought to be protected against concurrent or consecutive demands of the husband suing in the names of himself and his wife, and of the wife suing by her next friend. But an objection to the joinder of the husband with the wife as a co-plaintiff, where the suit relates to her *separate property*, must be taken by demurrer, and, if not thus taken, it cannot be entertained at the hearing. Story's Eq. Pl., §544. Where, however, the suit is for a *chose in action* of the wife, not settled to her separate use, the defendant cannot object to the husband's suing jointly with her as co-plaintiff, nor will her right to a settlement be prejudiced by the fact of her husband being so joined with her in the suit. 1 Daniell's Chanc. Pl. and Pr., (Perkins' Ed.,) 143. In any point of view, therefore, this suit, at this stage of the proceeding, must be regarded as being properly instituted in the names of the husband and the wife as co-plaintiffs, for the purpose of enforcing her separate right, and as we are satisfied that there is no estoppel arising from the covenants of her husband's deed to Ghostling which can be set up to defeat her rights growing out of the mortgage executed to her, it necessarily follows that the petitioners are entitled to a decree of foreclosure on that mortgage against the defendant.

II. The petitioners also claim to be entitled to a decree of foreclosure on the mortgage executed by Ghostling to Loel Bartlett on the 9th of March, 1857. The defendant's answer denies any notice or knowledge of the existence of that mortgage at the time the premises were conveyed to him on the 9th of July, 1857. The certificate of the town clerk of Searsburgh on the record of the mortgage in his office, states that the mortgage was "received and recorded on the 9th day of March, 1857, at 9 o'clock, A. M." Parol evidence was introduced before the referee, and received notwithstanding objections made on the part of the petitioners to its reception, tending to show that this certificate was in fact false; and, on that evidence, the referee found, and has reported,

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that this mortgage from Ghostling to Loel Bartlett was executed and delivered on the 9th of March, 1857, and left in the town clerk's office, in Searsburgh, for record at some time in December, 1857, and was not recorded until the last of February, 1858; that when the deeds conveying the premises from Ghostling to Pike, and from Pike to the defendant, were executed, which was on the 9th of July, 1857, this mortgage was neither on record nor on file in the town clerk's office in Searsburgh; that there was no evidence tending to prove fraud or collusion between the mortgagee and the town clerk in reference to the making of the certificate that said mortgage was recorded on the 9th of March, 1857; and that there was no evidence tending to show that the defendant knew of the existence of this mortgage when he received his deed from Pike. The only question which arises in reference to this mortgage is, whether the parol evidence which was received by the referee, and on which these facts were found, was admissible to contradict the certificate of the town clerk made on the record of the mortgage. The statute provisions relating to the duty of town clerks in respect to the recording of deeds and other conveyances, are contained in Comp. Stat., p. 116, sec. 31, p. 117, sec. 42, and p. 385, sec. 10. It is provided in sec. 42, p. 117, *ubi supra*, that "when a deed or other instrument for record shall be left in the office of the town clerk, he shall enter upon the record of such deed or instrument the true day and time of day when the same was received into his office, and shall indorse and sign upon such deed or instrument a certificate of the same fact. This provision appears first to have been incorporated into our statute law in the year 1834. Previous to that time, it had been held that the certificate of the town clerk of his having recorded a deed was to be treated only as *prima facie* evidence of the fact; and this must have been on the ground that the certificate, though not required to be made by any statute, should be considered, when made, as being a part of the record. *Taylor v. Holcomb*, 2 Tyler 44; *Johnson's administrator v. McGuire*, 4 Vt. 327. So it has been held that the certificates of justices of the peace, county clerks and town clerks of the fact of recording an execution and levy are but *prima facie* evidence, and may be rebutted by parol. *Hubbard v. Dewey*, 2 Aik. 312; *Morton et al. v. Edwin*, 19 Vt. 144; *Myers v. Brownell*, 2 Aik.

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407. The same effect has been given to the certificates of town clerks of the record of the proceedings of land tax collectors. *Carpenter v. Sawyer*, 17 Vt. 121; *Chandler v. Spear*, 22 Vt. 388. Although most of these cases are applicable to certificates made at a time when they were not required by any statute provision, we think that it makes no difference in principle whether the certificates were made pursuant to a requirement of the statute or not, in the absence of any provision giving to them a conclusive effect as evidence. We cannot believe that it was the intention of the legislature, in requiring this certificate to be made, to give to it any other character as evidence than that which had always been given to it when made prior to the enactment of the statute, or that there is any rule of policy which requires that an effect not expressed in the statute, and contrary to the whole course of our decisions on the subject matter, should now be given to such certificates. We are therefore of opinion that the certificate of the town clerk made on the record of this mortgage deed, of the time when he received this mortgage deed for record, was only *prima facie*, and not conclusive, proof of that fact, and that parol evidence was admissible for the purpose of impeaching the certificate in this respect. The facts found and reported by the referee upon this evidence are fatal to any claim for a decree of foreclosure against the defendant on this mortgage.

As the petitioners prevail in respect to the mortgage executed by Hill and wife to Harriet M. Bartlett, and as the defendant prevails in respect to the mortgage executed by Ghostling to Loel Bartlett, there should be a severance and apportionment of the costs of suit between the parties according to the usual practice in such cases.

The decree of the Chancellor dismissing the petition is reversed, and the cause is to be remanded to the Court of Chancery, with directions to enter a decree of foreclosure in favor of the petitioners on the mortgage executed by Hill and wife to the petitioner Harriet M. Bartlett, and dismissing the petition as to the other two mortgages described and set forth therein, and apportioning the costs of suit between the petitioners and defendants according to the usual practice in cases where each party prevails in part only.

Barnard & Co. v. Houghton's Estate.

JOHN M. BARNARD & CO. v. THE ESTATE OF COTTON M.
HOUGHTON.

Intoxicating Liquor. Foreign Law. Illegal Contract.

Where a manufacturer of liquor in Massachusetts was duly authorized to sell under the restrictions of the statute of 1855, concerning the manufacture and sale of spirituous and intoxicating liquor, among which restrictions was one that he should keep a tabular statement of all sales, containing the date, name of purchaser, &c., *held*, that although no tabular statement, according to the form prescribed by the statute, was kept by such manufacturer, still if his books, kept in the usual course of business, contained the same entries required in the tabular statement, it was such a substantial compliance with the law that a sale would be valid.

Where the form of the tabular statement given in the statute contained one entry, "purpose of sale," but the tenth section of the law providing for the sale by manufacturers did not contain a provision requiring such an entry, *Held*, that the form given in the statute could not be considered as adding a new requirement to the statute.

This was an action of book account brought by the plaintiffs against Cotton M. Houghton, in his life-time, and was pending in Windham county court at his decease, and the claim being laid before the commissioners on said Houghton's estate was disallowed by them. An appeal was taken, and the plaintiffs filed their declaration in the Probate court under the statute in assumpsit for goods sold. The case went to a commissioner, who reported as follows:

In January 29, 1857, Houghton then residing in Marlboro, Vt., and keeping a tavern there without a license, sent to the plaintiffs the order hereto annexed, marked A. The liquors mentioned in the order were intended to be sold by Houghton, and were afterwards in fact sold by him in Vermont in violation of the laws of Vermont.

The plaintiffs who resided in Boston, Mass., received the order A. in due course of mail, and put up the liquors of the quality and description ordered, and delivered them at the freight depot of the Vermont and Massachusetts railroad company, in Charles-

NOTE BY THE REPORTER.—A copy of the Massachusetts statute was not furnished the Reporter.

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town, Mass., February 4, 1857. The goods arrived at Brattleboro in due course, and were taken away either by W. W. Lynde, or by Houghton himself, it did not appear which. If taken by Lynde, I find it was done as agent of and by direction of Houghton. The freight was paid by whomever took the goods.

At the time of the sale and delivery of the liquors at the Charlestown depot, the plaintiffs were manufacturers and sellers of spirituous and intoxicating liquors in Boston, and had a license from the mayor and aldermen of Boston, a copy of which is hereto annexed, marked D. The firm of J. M. Barnard & Co., at the time of the issuing the license and up to the time of the said sale, consisted of John M. Barnard and Henry A. Fuller, who are the present plaintiffs.

The plaintiffs held their license D, and made their sale under an act of the legislature of Massachusetts, entitled "An act concerning the manufacture and sale of spirituous and intoxicating liquors," approved April 20, 1855, which act is made a part of this report.

The plaintiffs were manufacturers of liquor and actually manufactured the liquor sold to Houghton.

The plaintiffs at the time of sale did not comply with the directions of section 10 of said "act," literally.

They did not keep a tabular statement of any of their sales as directed by section 10, but they did in all cases enter on their book, in usual business form, the name and residence of the purchaser, and the time of sale, and the quantity, description and price of the liquors sold, but they did not in any case enter on their book the purpose for which the liquor was to be used; and in the case of this sale to Houghton, all the directions of section 10 were complied with, except that the entries were not made in the tabular form given in said act, and no entry was made of the purpose for which the liquors were to be used.

At the time of the sale the plaintiffs were not acquainted with Houghton—they did not know what business he was engaged in, but took it for granted that he was a merchant. They did not know for what purpose the liquors were to be used, nor did they know that they were to be sold, nor used in any way in violation of the laws of Vermont. The plaintiffs did then know that the

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use and sale of liquors were regulated by law in Vermont, but they did not know what those regulations were.

At no time after receiving order A till its execution did the plaintiffs make any inquiries as to what the law of Vermont was, nor as to the purposes for which the liquors were designed.

They had no opportunity of making such inquiries of Houghton, except by letter, Houghton not being in Boston, and having no agent there of whom to make inquiries.

ORDER A.

MARLBORO, JANUARY 29, 1859. •

Mr. Barnard—Dear Sir: Please send me three bbls. alcohol, 75 ct., and 10 gallon pine apple gin. Please send it as soon as you receive this. Mark it W. W. Lynde, Brattleboro depot, Vermont.

Yours truly,

C. M. HOUGHTON.

LICENSE D.

City of Boston. No. 9. This is to certify that John M. Barnard & Co. have been duly appointed and authorized by the mayor and aldermen to manufacture spirituous and intoxicating liquors, at 16 Adams street, and to sell the same in quantities of not less than thirty gallons, to be exported out of the Commonwealth, or to be used in the arts, or for mechanical and chemical purposes, or in any quantity to duly authorized agents of towns and cities as by law provided.

This authority is to continue for one year, unless sooner revoked and annulled by the mayor and aldermen.

(Signed,)

SAMUEL McCLEARY, City Clerk.

BOSTON, May 19, 1856.

The court, REDFIELD Ch. J., presiding, at the April term, 1860, having accepted the report of the referee in this case and rendered judgment thereon for the plaintiff, the defendant excepts.

Davenport & Haskins, for the defendant.

C. K. Field, for the plaintiff.

PECK J. This case came to the county court by appeal from the commissioners on the estate of Cotton M. Houghton, deceased. The plaintiffs' declaration is in assumpsit for goods sold and

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delivered. The case was referred to commissioners, who heard the case and reported specially to the county court, that court rendered judgment for the plaintiffs on the report, and the case comes into this court on exceptions to that decision. The question is whether upon the facts set forth in the report the plaintiffs are entitled to recover.

The claim is for a bill of spirituous or intoxicating liquors sold by the plaintiffs to the intestate in his life-time in 1857. It appears the sale was made in Massachusetts, and the validity of the contract must depend on the laws of that State, for although the report shows that the intestate bought the liquors for the purpose of selling the same in this State in violation of our statute, and did so sell them, yet it does not appear that the plaintiffs were so far privy to such unlawful purpose and sale as thereby to render the contract void as being in violation of our statute. The question and the only question made by the defendant's counsel is that the sale to the defendant was in violation of the statute of Massachusetts, entitled "An act concerning the manufacture and sale of spirituous and intoxicating liquors," approved April 20, 1855, which act is made part of the report.

It appears by that act that under it two kinds of licenses may be granted, one to manufacture, with a limited power to sell under regulations therein prescribed, and another to town and city agents appointed under the act to sell for certain specified purposes.

It appears by the report that at the time of the sale in question the plaintiffs were manufacturers of liquors in Boston, and there manufactured the liquors in question, having a license as such manufacturers, and while they had such license, sold and delivered the liquors to the defendant in the state of Massachusetts.

The only objection taken to the validity of the sale is that the plaintiffs did not keep such books, and make such entries therein, and in such form, as that act prescribes. Section ten of the act provides that every manufacturer authorized according to the provisions of the foregoing section, shall keep a book in which he shall enter the date of every sale of spirituous liquors made by him, the name of the purchaser, his residence, and the quantity and kind of liquor sold, and if exported, the place to which

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exported, and the name of the assignee, substantially in the following form, to wit: Then follows a tabular form, with seven columns separated by lines headed respectively, (date,) (name of purchaser,) (residence of purchaser,) (quantity and kind of liquor,) (where exported,) (name of assignee,) (purpose of sale.)

The commissioner reports that "they did not keep a *tabular* statement of any of their sales as directed by section ten, but they did in all cases enter on their books, in usual business form, the name and residence of the purchaser, and time of sale, and the quantity, description and price of the liquors sold, but they did not in any case enter on their books the *purpose* for which the liquor was to be used; and in the case of the sale to Houghton all the directions of section ten were complied with, except that the entries were not made in the *tabular form* given in said act, and no entry was made of the purpose for which the liquors were to be used."

As to the first objection by the defendant's counsel in argument, that the entries were not in the form prescribed, the court are of opinion that there was not such a substantial departure from the statute as to render the sale void.

As to the other objection made by the counsel, that no entry was made of the *purpose* for which the liquor was to be used, it will be noticed that although this is required in the sixth section regulating sales by town and city agents, it is omitted in section ten, which regulates sales by manufacturers. It is true that in the form that is prescribed as before stated, there is a column at the close headed "purpose of use." We think that adding this column as to the use to the form, when it is omitted in the body of the section, cannot have the force of adding a new requirement to this section; that it is more probable that as it appears in a previous form given for section six, relating to sales by agents, it occurred by repeating the same tabular form substantially that follows section six, regulating sales by town and city agents, in which section the *use* is required in the body of the section to be entered. We think this view is the correct exposition of section ten, from the fact that town and city agents are only empowered to sell for certain specified purposes, that is, "*to be used in the arts, or for medical, chemical and mechanical purposes, and no*

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other," and section seven imposes a penalty on any purchaser of a town or city agent who shall make a false statement as to the use intended, hence a requirement that an entry of the use for which the sales are made might be supposed to be a check upon the agent to prevent him from selling for uses or purposes not within his license; but in case of manufacturers they are authorized to sell for exportation in quantities not less than thirty gallons without reference to the use to which it is to be applied, and in such sales which would be likely to be the greatest portion, it would not seem to be within the policy of the act to require any such entry. This omission, therefore, does not render the contract void.

Notwithstanding the act makes it penal to sell contrary to its provisions, and though it is provided in the act that the person so licensed shall give a bond conditioned, "that he shall in all respects conform to the provisions of law relating to the business which he is authorized as above to pursue, and shall violate no law touching the manufacture and sale of spirituous or intoxicating liquors," and though it is further provided that if any person so authorized shall commit any breach of the conditions of his bond, "his certificate shall thereupon become null and void, and he shall not thereafter be authorized or permitted to manufacture or sell spirituous or intoxicating liquors," we still think that no such substantial breach of the law is shown in either of these two particulars as will render the contract void.

It is provided in section fourteen that on notice to the party licensed, and on hearing if it shall appear that such party has been guilty of a breach of the bond, the authorities shall "revoke and make void his authority" or license; and it is questionable whether, notwithstanding the provision that in case of a breach of the bond the license shall be null and void, it does not require the action of the authorities annulling the license before it can be treated as absolutely void—whether void means anything more than voidable, but it is not necessary to decide this point, as we do not find such omissions in former sales as annuls the license, although the report does not state so fully as to the entries made in other and former sales as in the one in question.

Judgment affirmed.

Holman v. School District No. 4 in Halifax.

MARIA HOLMAN v. SCHOOL DISTRICT NO. 4 IN HALIFAX.

School. Certificate. Contract.

A town superintendent of schools appointed by the selectmen to fill a vacancy in the office, may, while in office, grant a certificate to teach school, which will be good for one year from the time it is granted, although the term of office of such superintendent may have expired before the termination of such year.

Where a teacher obtained a certificate to teach for one year from the 17th of December, 1857, and in the summer of 1858 was employed by the defendant to teach school for the winter next ensuing, and pursuant thereto taught such school for five weeks before her certificate expired, and six weeks afterwards without obtaining a new certificate, *Held*, that inasmuch as she had a certificate when she was employed and actually commenced the school, she might recover for the services performed both before and after the expiration of the certificate.

This was an action to recover wages for teaching school in the defendant's district.

The case was submitted to the court on the following statement of facts :

In the month of October, 1857, a vacancy occurred in the office of school superintendent in Halifax, and the selectmen on the 17th day of said October, appointed H. E. Johnson, superintendent, to fill said vacancy, and he held that office until the annual March meeting of 1858, at which meeting George Atkinson was chosen superintendent, and held that office till April, 1859.

On the 17th day of December, 1857, the plaintiff who had engaged to keep the district school in district No. 6, in said Halifax, was examined by said Johnson, who then executed and delivered to her the annexed certificate, (she being known as well by the name of Minna as Maria.)

In the summer of 1858, the plaintiff was duly employed by one Legate, the prudential committee of district No. 4, to keep the summer school in said district, and did keep and teach the same for several weeks, and was paid therefor, and this she did without any examination by said Atkinson or procuring from him any certificate therefor.

The plaintiff was again employed by said prudential committee to keep the next winter school in said district twelve weeks for two dollars and fifty cents per week, and did so keep and teach

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said winter school for twelve weeks, commencing five weeks and four days previous to the 17th of December, 1858, and continuing said school six weeks and three days after said last named day. The plaintiff did not procure any new examination to be made as to her qualifications before said school commenced, and finished said twelve weeks without any new certificate, and the only demand made by her on said district prior to the commencement of this suit, was by presenting on the 9th of April, 1859, an order to the treasurer of said district, said order being dated April 7, 1859, and drawn by said Legate as prudential committee, seven days after his term of office had expired, and said district had chosen a new prudential committee, who had accepted and been qualified in his stead.

Said district have not paid the plaintiff for teaching and keeping said school for said twelve weeks, or any portion thereof, for which this suit is brought.

CERTIFICATE.

This may certify that Miss Minnie H. Holman has duly passed the examination in all the requisite branches usually taught in our district schools. Therefore, I hereby license her to teach the same in Halifax, Vt., for the year ensuing.

H. E. JOHNSON, M. D., Town Superintendent.

Halifax, December 17, 1857.

The court, REDFIELD Ch. J. presiding, at April term, 1860, rendered judgment for the plaintiff to recover the amount claimed by her as set forth in the foregoing statement of facts, being \$30, and interest thereon. The defendants excepted.

Kirkland & Clark, for the defendants.

Bradley & Kellogg, for the plaintiff.

PIERPOINT J. This action is to recover the plaintiff's wages for teaching school in the defendant's district. It is conceded that the work was done and the services faithfully performed, and there is no controversy about the amount agreed to be paid. But it is insisted that the plaintiff had not complied with the requirements of the statute as to the procuring of a certificate of

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her qualifications of the town superintendent before she opened her school.

The case shows that on the 17th of December, 1857, the plaintiff obtained the requisite certificate of the then superintendent of the town of Halifax ; that in the fall following she was employed by the prudential committee of district No. 4 to teach their winter school for the term of twelve weeks ; that she commenced the term five weeks and four days prior to the expiration of one year from the time she obtained her certificate. But it is said this certificate did not continue in force for one year from its date, but only during the period of the official existence of the superintendent who granted it, that is, until the then next March meeting, when all officers of this character are elected, and when the authority of this superintendent expired.

The statute relating to public instruction, in the eighth section declares that such certificate "shall be available for one year only ;" there is nothing to be found in the statute tending to show that there was any intention on the part of the legislature to make the availability of this certificate in any respect dependent upon the official or personal existence of such superintendent, or to limit it to any other period than one year from the time it was given, or to confine its operation to contracts to teach in any particular district in the town as is claimed, neither are we able to find in the spirit, object, or purpose of the statute on this subject, or in analogy, any reason or authority for imposing any such limitation upon the operation of such certificates. The certificate when obtained authorizes the person to whom it is given to enter into a contract for and enter upon the duties of teaching the district school in any district in the town for which it was given, for the period of one year, and to enforce payment for the services, according to such contract, when the duties are faithfully performed.

It is further insisted that as the force of the certificate expired by its own limitation before the expiration of the period for which the contract was made, the plaintiff can recover only for that portion of the services that were performed within the year. By the twelfth section of the statute it is provided that any contract for teaching made between the prudential committee and

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any teacher shall be null and void, if the teacher shall fail to obtain a certificate of qualification of the superintendent of the town, and before the commencement of the school.

In this case, at the time the plaintiff made the contract and opened the school under it, she had obtained a certificate of qualification according to the requirements of this section, and the contract was a valid and binding one, and we think this is all that is required by the letter or the spirit of the statute. The fact that her right to enter into another contract had expired before this was completed, can have no effect upon the validity of this. Its validity is not made to depend upon any event that shall transpire subsequent to the commencement of the school. There is nothing in this case tending to show that there was any intent to evade the statute. If the contract had been made for a period of such unusual length as to raise a suspicion of an intent to defeat the object and beneficial purposes of the statute, it would present a different question, but here the period was of the ordinary length, and there is nothing to impeach the perfect good faith of all parties.

Again it is said the plaintiff did not comply with the provisions of the act of 1858 in respect to the keeping and returning a register, &c. This act was passed subsequent to the time the plaintiff entered into this contract and commenced the school, and whether she would come within its provisions, or not, is questionable. But that is a question which we are not called upon now to decide. The case does not show that she did not comply with the requirements of that act; it is silent upon the subject; and if that statute did impose any duties upon her we are not now to *presume* that she did not discharge those duties, in order to defeat her recovery.

It is not necessary to inquire into the validity of the order that the plaintiff presented to the treasurer of the district, or the sufficiency of her demand, as it is very clear that no demand was necessary to perfect the plaintiff's claim, or as a condition precedent to her right of action.

Judgment of the county court affirmed.

CASES
ARGUED AND DETERMINED
IN THE
SUPREME COURT
OF THE
STATE OF VERMONT,
FOR THE
COUNTY OF WINDSOR,
AT THE
FEBRUARY TERM, 1861.

PRESENT:
HON. LUKE P. POLAND, CHIEF JUDGE.
HON. JOHN PIERPOINT,
HON. JAMES BARRETT,
HON. LOYAL C. KELLOGG, } ASSISTANT JUDGES.
HON. ASAHIEL PECK,

THOMAS E. POWERS *v.* WILLIAM SKINNER.

Illegal Contract.

A contract for the performance of services as a lobby agent or for the exertion of one's personal influence and solicitations, to procure the passage of a public or private act of the legislature is void, as being prejudicial to sound

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legislation and against public policy, and there can be no recovery for such services either on the special contract or a *quantum meruit*.

The defendant promised to pay the plaintiff a certain sum in consideration of his engagement to labor faithfully before the legislature for the charter of a bank; and the auditor found that the plaintiff under this contract was expected to and did solicit members of the legislature in behalf of such project, as he had opportunity. *Held*, that this was equivalent to an express finding that the contract contemplated the exercise by the plaintiff of his personal solicitation with members of the legislature in support of the application for the charter, and that the contract was therefore void.

BOOK ACCOUNT. The auditor reported that the defendant agreed to pay the plaintiff five hundred dollars, in consideration that the plaintiff agreed to labor faithfully before the legislature of 1853 for a charter of a bank at Royalton. The auditor further reported as follows :

“ That at the session of 1853, bank charters were asked for at Northfield, Bradford, Waterbury, Jamaica, Springfield, and Royalton, that such applications had been advertised and were known to the parties, at the time of the plaintiff's employment; that early in the session, the respective friends and hired solicitors for the respective charters began to combine their forces, and consult upon the most feasible plan to accomplish a common purpose—to obtain special bank charters. The general banking law was deemed one great impediment, and they combined their forces, so far as practicable, to overcome that impediment, and this was done with the concurrence of the parties to this suit, and the agents and solicitors of the several charters. They consulted upon the policy of putting the strongest case forward, that it might clear the way for the weaker, and “ draw after ” it those of “ less bottom and strength.” The plaintiff advised to put Northfield forward; and it was so done. The friends of the several charters, generally, labored and voted for the Northfield charter, under the expectation and agreement, that Northfield should stand by and help the others. The several applications prevailed. Without such “ log-rolling ” combinations doubtless many, or at least some, would have failed; but the auditor knows of no instrument by which the exact merit of the Royalton application can be measured; nor can he determine what would

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have been its fate before that legislature had it stood alone, or upon its own merits.

The plaintiff was energetic, shrewd, laborious, and faithful. The auditor does not find that the plaintiff made any agreement to use improper means to obtain his ends, yet he was, doubtless, expected to appropriate to his use such agencies as were effecting other measures, and thus possess the aggregate strength of all; for such things have long been in use in our legislature, and, at least, sanctioned by usage.

The fact that an unusual number of measures, of a local and private nature, before the legislature at that session, induced formidable organizations by pressure without and combination within, to effect the ends proposed, is perhaps the main reason why "log-rolling" was so rampant and mischievous, at that session. The auditor has no doubt that legislation often "suffers a detriment," and did at that session, from those outside agencies, which in common parlance are called log-rolling. When measures drag hard there is great temptation to resort to means more desperate, even downright corruption.

But the auditor does not think that the plaintiff should be affected by the acts of others, even of those who labored for the same end for which he contended, except so far as he sanctioned them. There was no proof that the plaintiff lent his aid to any measure that he did not believe to be right; he favored honestly, no doubt, banks at Northfield and Bradford, and appropriated, so far as he could, the friends of them to subserve his own purpose—a bank at Royalton, and did this by a mutual understanding, among the friends of each, to render mutual aid. If this vitiates the contract, the plaintiff should be affected by it. If the plaintiff recovers upon the contract, he should recover five hundred dollars and interest from the first day of May, A. D. 1854.

If the plaintiff should recover, as of a *quantum meruit*, the auditor finds that the plaintiff paid out for board and rail road fare, etc., one hundred dollars. As to the value of his services,—if they are to be valued by the end attained, his charge in the opinion of the auditor, is extravagant.

If the "*quantum*" is determined by the plaintiff's capacity

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to organize numbers into a unit, and to hold them steadily to one purpose, against opposition, and "against odds," his services are valuable. Without his services, it is quite probable no charter would have been obtained.

If he should recover what solicitors in such service, of leading talents, usually receive, the auditor thinks he should recover two hundred and eighty dollars and interest from January 1st, 1854.

The auditor finds that no contract was made that the plaintiff should use any specific means to effect his purpose, but was expected to and did solicit members of the legislature in behalf of his project, as he had opportunity.

The plaintiff was a doctor, and not a lawyer, and was employed by reason of his ability, and the facilities he possessed to influence the legislature; and his former position in the House of Representatives, and familiarity with legislation and with members was one of these facilities.

It was known to some extent that the plaintiff was employed for the Royalton bank, and there was no proof that he used any stratagem or other means to conceal his relation, but, in his solicitations he did not generally declare or promulgate that he was hired or employed, but when asked he did not evade or conceal the fact."

On the foregoing report, the court at December term, 1857, REDFIELD, Ch. J., presiding, rendered judgment for the defendant, to which the plaintiff excepted.

P. T. Washburn, for the plaintiff.

A party may legally solicit from the legislature, in a proper manner, and obtain, by proper means, the enactment of a statute, in which he has, or deems that he may have, an interest, and may furnish all information, facts or statistics, pertinent to the matter. And what he may legally do by himself, he may legally employ an agent to do in his behalf. *Wood v. McCann*, 6 Dana 366 (4 U. S. Dig 67;) 2 Pars. on Cont. 260; *Hunt v. Test*, 8 Ala. 719. A legal contract may, therefore, be made, for services in soliciting and obtaining from the legislature the charter of a bank.

If the terms of a contract are ambiguous, or will admit of

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more than one construction, the court will always give it that construction, which will uphold it as a legal and valid contract, rather than one which would render it illegal and invalid. *Richardson v. Mellish*, 2 Bing. 229, (9 E. C. L. 391.) *Harrington v. Klopogge*, 2 Chit. 475, (18 E. C. L. 396.) *Porritt v. Baker*, 59 Eng. L. & Eq. 500. *Goldham v. Edwards*, 36 Eng. L. & Eq. 319. 2 Pars. on Cont. 16.

The contract, in this case, is specifically stated by the auditor, to have been a promise by the defendant to pay the plaintiff five hundred dollars, "in consideration that the plaintiff engaged to labor faithfully before the legislature of 1853 for a charter of a bank at Royalton."

There was no element of illegality in the contract thus made. *Hunt v. Test*, 8 Ala. 719.

The compensation was not to be contingent upon success.

There was no agreement, that the plaintiff should exert personal influence in promoting the object.

There was no agreement, that the plaintiff's agency should be kept a secret from the legislators.

There was no agreement, that the measure should be procured by the formation of undue combinations.

In all these respects the case is unlike those in which contracts for lobby services have been held invalid,—as in *Marshall v. Balt. & Ohio R. R. Co.*, 16 How. 314, where, by the agreement, the compensation was to be contingent, and the agency kept secret,—and in *Clippenger v. Hepbaugh*, 5 Watts & Serg. 315, *Rose v. Truax*, 21 Barb. 361, and *Fuller v. I'ame*, 18 Pick, 472, where the agreement was for the exercise of personal influence.

And it is unlike an agreement to withdraw opposition to the passage of an act by the legislature,—the English cases sustaining which are criticised in Redf. on Railways, 663, and contradicted by *Pingrey v. Washburn*, 1 Aik. 264. There is a broad distinction, both in morals and in law, between that contract, which has for its object the withholding and suppressing secretly from legislators information or facts, important for their consideration, and that contract, which has for its purpose the bringing of the same or similar facts to their notice.

And in the absence of any agreement for the use of unlawful

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means in procuring the charter, the fact, that the plaintiff did bring to his aid the friends of other measures, which he honestly advocated, cannot have an *ex post facto* relation, and render that illegal, which, in its inception and by its terms, was legal and proper. A contract cannot thus be avoided by matter subsequent. *Davis v. Bank of England*, 2 Bing. 393, (9 E. C. L. 444.) *Howden v. Simpson*, 10 Ad. & El. 793, (37 E. C. L. 249.) *Lampleigh v. Brathwaite*, Hob. 105.

The auditor finds, that the plaintiff "concurred" in the act of the friends of several charters to overcome the negative effect of the general banking law and put the strongest application forward; but he does not find, that he did any act in this respect, or was employed to do any. He finds, that the plaintiff lent his own aid to no other measure, which he did not deem to be right; and he does not find, that the aid, which was furnished by others, was of an improper character, or was improperly exercised.

There can be no inference drawn, which shall vary the contract of the plaintiff from the terms stated by the auditor. That would be an inference of fact, which the auditor has expressly negated, by the terms which he has used in stating the contract, and which, for that reason, the county court could not draw. The power of that court in this respect, extends to those cases, only, where the auditor has reported facts tending to a conclusion, but has not drawn any conclusion; but where the auditor has drawn the inference, or stated the fact, his finding is conclusive. *Stone v. Foster*, 16 Vt. 546. *Birchard v. Palmer*, 18 Vt. 203.

Dudley C. Denison and *Peck & Colby*, for the defendant.

This contract is void, being against public policy. *Marshall v. Balt. & Ohio R. R. Co.*, 16 How. 314, 336; 21 Curtis 153; *Pingrey v. Washburn*, 1 Aik. 264; *Clippenger v. Hepbaugh*, 5 Watts & Serg. 315; *Redfield on Railways* 663; *Noyes v. Day*, 14 Vt. 384.

2. It is true the auditor does not find that the plaintiff made any agreement to use improper means to obtain his ends. Yet he was expected to appropriate to his use such agencies as were effecting other measures, and thus possess the aggregate strength of all.

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The auditor finds that the plaintiff appropriated the friends of the other banks, which he favored, to procure a bank at Royalton, and this by a mutual understanding among the friends of each to render mutual aid. That is, the plaintiff took upon himself the business of assisting to procure several charters, and sold out the friends of each to the friends of each other, and by this means *log-rolled* the several charters through the legislature successfully.

3. The auditor expressly finds that the plaintiff was expected to and did, solicit members of the legislature in behalf of his project, and was employed partly because of facilities he possessed to influence the legislature, and his familiarity with legislation, and *with members*, was one of the facilities. It does not appear that he *solicited* votes of the members by prosecuting the merits of any one of the various applications, but "the friends of the several charters" generally, labored and voted for the Northfield charter, under the expectation and agreement that Northfield should stand by and help the others.

Northfield was only put forward because this plaintiff so advised, believing it to be the strongest case, and would "clear the way for the weaker." That is, the charters were not expected to prevail upon their own merits, but by the influence which this plaintiff could bring to bear upon the members, by personal application to them, and by combinations utterly subversive of all proper legislation.

KELLOGG, J. Courts of justice have, with jealous care, endeavored to protect every branch of the government from all illegitimate and sinister influences and agencies; and it has been settled by a series of decisions, uniform in their reason, spirit, and tendency, that an agreement in respect to services as a lobby agent, or for the sale by an individual of his personal influence and solicitations, to procure the passage of a public or private law by the legislature, is void as being prejudicial to sound legislation, manifestly injurious to the interests of the state, and in express and unquestionable contravention of public policy. *Clippenger v. Hepbaugh*, 5 Watts & Serg. (Penn.) 315. *Wood v. McCann*, 6 Dana (Kentucky) 366. *Marshall v. Balt. &*

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Ohio R. R. Co., 16 Howard (U. S. Sup. Ct.) 314. *Harris v. Roof's Executors*, 10 Barb. (Sup. Ct.) 489. *Rose et al. v. Truax*, 21 ib. 361. *Bryan v. Reynolds*, 5 Wisconsin 200.

The principle of these decisions has no respect to the equities between the parties, but is controlled solely by the tendency of the contract; and it matters not that nothing improper was done, or was expected to be done, under it. The law will not concede to any man however honest he may be, the privilege of making a contract which it would not recognize when made by designing and corrupt men. A person may, without doubt, be employed to conduct an application to the legislature as well as to conduct a suit at law, and may contract for, and receive, pay for his services in preparing and presenting a petition or other documents, in collecting evidence, in making a statement or exposition of facts, or in preparing and making an oral or written argument, provided all these are used, or designed to be used, either before the legislature itself, or some committee thereof, as a body; but he cannot with propriety be employed to exert his personal influence, whether it be great or little, with individual members, or to labor privately in any form with them, out of the legislative halls, in favor of or against any act or subject of legislation. The personal and private nature of the services to be rendered is the point of illegality in this class of cases. *Sedgwick v. Stanton*, 14 New York, (4 Kernan) 289. Our government, in theory, is founded on the most exalted public virtue, and the principle which forbids the legal recognition of any contract for such services is so essential to the purity of the government, and is so firmly established as a rule of public policy, that it requires no vindication. It has not been questioned by counsel in argument, and no member of the court has had any doubt in respect to its propriety, or any hesitation in recognizing its authority. It is equally well settled that where a contract is an entire one, and contains an element which is legal, and one which is void as being against public policy, it cannot be sifted, so that the legal service rendered under it, or in its pursuit, can be separated from the illegal service, and a recovery had for so much of the service as would, if considered by itself, be adjudged to be legal. If any part of an indivisible promise, or any part of an

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indivisible consideration for a promise, is illegal, the whole is void, and no action can be maintained on it. Chitty on Contracts, 536, c; *Fillson's trustee v. Himes*, 5 Penn. 452; *Rose et al. v. Truax*, *ubi supra*.

The plaintiff seeks to recover in this action for services rendered by him before the legislature of this state in the year 1853, in aid of an application for a charter for a bank at Royalton, under a contract or agreement made with him by the defendant; and he relies upon the contract as the only ground for the defendant's liability. The important question in the case, therefore, is, whether the contract relied on to support the plaintiff's claim contained any illegal element or feature; and this must be determined by the facts reported by the auditor in reference to the character of the services which the contract called for, as understood by the parties. On this point in the case, we have not had entire unanimity in our conclusions; but our difference of opinion arose exclusively upon the interpretation of the auditor's report, and not upon any principle applicable to the facts stated by the auditor.

In the case of *Newman v. Cole*, 3 Esp. 253, it was held that assumpsit would not lie to recover back money deposited for the purpose of being paid to a person for his interest in soliciting a pardon for a person under sentence of death, and, on the case being opened, Lord ELDON, Ch. J., expressed a doubt whether the action was maintainable, "saying that he would hold the plaintiff to very strict proof of the means used to procure the pardon." The reason and spirit of this remark is, in our judgment, especially applicable to claims for services like those charged in the plaintiff's account. Such services should clearly appear to be legitimate, or they cannot be recognized as the basis of a legal claim. The auditor has found that the contract was a promise on the part of the defendant to pay the plaintiff five hundred dollars "in consideration that the plaintiff engaged to *labor faithfully* before the legislature of 1853 for a charter of a bank at Royalton." This statement of the contract, taken by itself, throws but very little light on the character of the services which the plaintiff expected or undertook to render, and is consistent with the claim that no illegal service was contemplated or stipu-

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lated for by the contract ; but the auditor has also found that while no contract was made that the plaintiff should use any specific means to effect his purpose, "he was expected to, and did, solicit members of the legislature in behalf of his project as he had opportunity." A majority of the court are of opinion that this statement is equivalent to an express finding by the auditor that the contract, as understood by the parties, contemplated the use or exercise by the plaintiff of his personal solicitations and influence with individual members of the legislature in support of the application which he was employed to favor and promote ; and the other facts reported by the auditor, if they do not strengthen this conclusion, cannot be regarded as impairing it, or as furnishing any aid to the plaintiff's claim. The only services rendered by the plaintiff which are stated or described by the auditor in his report are clearly such as cannot be made the subject of a legal claim. The law lends no sanction or support to contracts for such services, but leaves the party who seeks the wages for his service to rely on the honorary obligation alone. It is not within the province of courts of justice to balance or adjust the equities growing out of such transactions. In this view of the contract under which the plaintiff's services were rendered, it is apparent that it contained an illegal element, and was, for that reason, wholly void. As the plaintiff's claim rests upon no other ground for support, there can be no recovery upon it.

Judgment of the county court in favor of the defendant, upon the auditor's report, affirmed.

BARRETT, J., dissenting. As I am unable, after having heard this case three times argued, to concur with the majority of the court, in the conclusion to which they have come, I deem it due to myself, and to the case, briefly to state my views.

The argument on both sides, and the decision have proceeded upon the ground, that the rights and liabilities of the parties arise from, and stand upon, the contract that was made between them for the services to be rendered by the plaintiff, in behalf of procuring the charter of a bank at Royalton. There is no difference of view between counsel, or between the members of the

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court, as to the principles and rules of law, which govern the subject of this kind of contracts.

What the contract was, in this case, was submitted to the finding of an auditor ; and it is to the contract, as a majority of the court understand that *he has found it*, that they have undertaken to apply the law, which rightfully governs, in pronouncing whether it be valid or void. If the contract, *which the auditor has found*, constituted or embraced an agreement for the doing of any thing illegal by the plaintiff, on account of being against public policy, or good morals, it should be declared void. If it was free from such view, then, it is agreed that it should be upheld.

The important inquiry is, what really has the auditor found the contract to be ?

This seems to be comprehensively and explicitly answered in the report ;—“ A promise on the part of the defendant to pay the plaintiff five hundred dollars, in consideration that the plaintiff engage to labor faithfully before the legislature of 1853, for a charter of a bank at Royalton.” In another part of the report, the auditor states, that “ he does not find that the plaintiff made any agreement to use improper means to obtain his ends.” The defendant does not assert any failure of performance, on the part of the plaintiff ; and the auditor finds, that the plaintiff was energetic, shrewd, laborious and faithful.

The defence has, in no degree, rested on the *manner* of the performance by the plaintiff ; nor has the decision of the court, as I understand it ; but exclusively on the *quality of the contract* made by the parties. This is the only tenable ground of defence.

In *Lord Howden v. Simpson*, 37 E. C. L. 249, Ch. J. TINDAL says “ the quality of the agreement, whether fraudulent or not, must depend upon the intention of the parties to it at the time of making it ; and if there did not *then* exist the intention of deceiving the legislature by concealing from it, whilst the petitioners were asking for one set of favors, the purpose of afterwards asking for others, the agreement cannot be void, whatever imputation might rest on the conduct of the parties in making the subsequent concealment.”

All agree that it is lawful for persons, interested in procuring some specific enactment, to procure and use the aid of others

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before the legislature for that purpose. The contract, by which such aid is procured, becomes unlawful only when it embraces an agreement that the person employed is to use improper means to influence the action of the members of the legislature—such as personal solicitation, *log-rolling*, bribery, and the like. All agree that upon the contract, as it is above set forth, no illegality is apparent. When, therefore, that is followed in the report by the statement of the auditor, that “he does not find that the plaintiff made any agreement to use improper means to obtain his ends,” elements of illegality, *as matters of fact*, as it seems to me, are conclusively excluded from the contract which the auditor has found to have been made by the parties, unless the court may exercise the prerogative of either disbelieving the auditor, or of passing over him, on matters of fact resting in evidence that is addressed to him alone.

It is true that the auditor has diffusely set forth many things that were done during that session of the legislature in reference to procuring charters of banks, in which the plaintiff participated; and if the doing of those things had been stipulated for in the contract of employment, without doubt it would have tainted it with fatal illegality. But as they were all done subsequently to the making of the contract, they could at most have been *matters of evidence*, to be considered by the auditor in determining what was the contract. See *Lord Howden v. Simpson*, cited above, p. 249–50. He has also interspersed his statement of these things with many judicious moral hints and suggestions, in a manner that shows that such things would have full weight with him as evidence in their tendency to prove an illegal agreement between the parties. Yet, in view of all the things he has stated, as well things that had transpired under his own observation, and in relation to other matters, (of which he seems to have taken judicial cognizance,) as those shown by the evidence, and connected with the subject of procuring the charter in question, and influenced by the impression they would make upon such moral sensibilities as his report shows him to possess in this respect, he avows that “he does not find that the plaintiff made any agreement to use improper means to obtain his ends.” In the face of that negation by the auditor, it is new doctrine to me that it is either the

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duty or the right of the court to find that the plaintiff *did make an agreement to use improper means*—the fact upon which the whole ground and theory of the defence and the decision are made to rest. It is needless to repeat what has passed into the common maxims, that the express finding of a contract, or other matter of fact, precludes *all implications* in modification of such finding.

Great stress was laid in the argument by the defendant's counsel, and in the opinion that was read in announcing the decision, upon two expressions in the report, one following the language last above quoted, and constituting a kind of antithesis to that quotation, viz: "Yet he was doubtless expected to appropriate to his use such agencies as were effecting other measures, and thus possess the aggregate strength of all; for such things have long been in use in our legislature, and at least sanctioned by usage." Two remarks are elicited in respect to this. First, it seems to me obvious from the structure of the expression that it was not designed to convey the idea, much less to state as a fact, that the plaintiff was so cognizant of such expectation, or so responded to it, at the time the contract was made, as to cause it to constitute a part of the contract. If such had been the design the expression would have been differently framed. Instead of saying "he was expected," it should have been, "it was expected that he would appropriate," &c., or "he expected to appropriate," &c., which forms of expression are capable of including the plaintiff as a party to such expectation, while that used by the auditor excludes him as a participant in the expectation. The expression used implies an expectation only on the part of others, and not on the part of the plaintiff himself.

Taken in connection with such structure of this expression, the preceding clause seems to me to be conclusive and absolute, in showing that the auditor did not design to convey any idea that such expectation entered into the contract. The other remark is, that the closing clause of the sentence indicates that he designed said expression only as one of his free comments, and not as the finding of any fact in qualification of the contract, as at first stated by him, and afterwards guarded by his negation of finding any agreement by the plaintiff to use improper means.

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His expression, "yet he was doubtless expected," &c., instead of being a conclusion of fact from the evidence adduced on the trial was obviously a remark suggested by the auditor's personal familiarity with the usages attendant upon legislation.

The other expression, on which stress is laid as above stated, is in the answer to the first request, the last clause, viz : " but (plaintiff) was expected to, and did solicit members of the legislature in behalf of his project as he had opportunity."

The remarks that I have made as to the former of said expressions are applicable in the main to this. The form of the expression is inconsistent with the idea that the auditor designed by it to state as a fact found by him that the plaintiff was a party to the expectation named. It is consistent only with the idea that he meant to represent such expectation as being entertained by others, and not concurrently by the plaintiff and defendant at the time of the making of the contract between them, in any such sense as to enter into and qualify the contract as at first stated in the report. If I am wrong in these views, I have only to confess that the language of the report effectually *conceals* instead of revealing to my mind and apprehension the idea and meaning of the auditor.

The auditor in this case fully understood his province and duty. He understood the essential elements of a contract, and the law of just implications, as well as of express terms, in determining what, *in point of fact*, was agreed between the parties. When he, therefore, stated explicitly what he found to be the contract, it was the contract as deduced from all the evidence bearing on the subject, embracing as well what was actually expressed between the parties, as what was legitimately and fairly to be implied from all that transpired in relation to the subject matter of the contract; *it was the statement of the terms to which the minds of the parties concurrently consented*, whether shown by direct proof of the language used by the parties, or inferred from the circumstances and incidents that made up the history of the entire enterprise from its first suggestion down to the final act. The undertaking of the defendant was to do a single act, viz : *to pay plaintiff five hundred dollars*, the consideration for which was that the *plaintiff engaged to labor faithfully before the*

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legislature for a charter of a bank at Royalton. I fail to find in the report any statement of any other or further consideration for the promise to pay the five hundred dollars, any engagement on the part of the plaintiff to do any thing but what is implied in laboring faithfully; and to preclude any inference or implication of any unlawful service to be rendered under the engagement, the auditor expressly negates finding any agreement to that effect.

I have always understood that in order to warrant the pronouncing of a contract void on account of its being tainted with immorality, such taint should be proved and found in the mode prescribed by the law, not guessed at and presumed. But I am compelled to say in this case that it seems to me such taint is assumed by the court to exist when the contrary is explicitly found by the auditor, to whom alone the evidence of facts is addressed, and who, by his express finding of the contract, both affirmatively as to terms and negatively as to the view asserted by the defendant, is fatal to its validity, has left to the court no vocation of inference or implication as to facts.

While I trust that I am not behind my brethren in my disapprobation of such practices as the auditor represents for securing success to measures before the legislature, nor in my readiness to apply the law in avoiding any contract that should embrace an agreement for the doing of such practices, I am unable to follow them in pronouncing a contract void which, as I understand the report, does not embrace "*any agreement to use improper means*" in behalf of the measure which the plaintiff was employed by the defendant to serve.

NOTE.—Judge BENNETT heard the first argument of this case, and has examined this dissenting opinion. He authorizes me to say that he concurs in the views therein expressed.

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PETER D. MARSH v. JUSTIN BURT.

Deed. Construction of Description of Land bounded upon a Highway.

Where land is bounded "upon," "on" or "along" a highway, the presumption is that the line extends to the middle of the highway.

A piece of land was described as follows : "Beginning on the west side of the road at the end of a wall, running westerly on said wall and in a straight line therewith to the west line of lot No. 3, thence on said west line to the centre line of said lot No. 3, thence on said centre line to the road, thence on said road to the place of beginning." *Held*, that the west line of the land extended to the middle of the highway.

Another piece was described as follows : "On the south side of the road opposite to the last mentioned piece fenced on two sides, being a ridge of land lying between said road and the centre line of lot No. 3 to extend so far east as to make just five acres." *Held*, that the line extended to the middle of the highway.

Another piece was described as follows : "Opposite to the last mentioned piece on the east side of said road within the fences or wall." *Held*, that inasmuch as it in fact was bounded on the highway though not so described, taken in connection with the fact that the three pieces were all conveyed together, it must be deemed to have been the intention of the grantor to convey to the middle of the highway.

If the language of a deed describing land conveyed, bounded upon a highway, leaves it doubtful whether the grantor intended the line to be in the centre or on the side of the highway, the boundary will be construed to be the centre of the road.

Tresspass Qua. Clau.—Plea, the general issue, with notice of special matter, that the close in which &c., was the soil and freehold of the defendant.

The facts of the case sufficiently appear in the opinion of the court.

Rounds & Adams, for the defendant.

Washburn & Marsh, for the plaintiff.

PIERPOINT J. The questions in this case arise upon the construction of the deed from Bliss Goddard to Rodolphus Burt, through whom the defendant claims. It appears that on the 26th day of February, 1839, Bliss Goddard, who then owned the north

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half of lot No. 3, conveyed the same to Rodney Clough, excepting three several pieces, which are particularly described in the deed. On the same day by deed of warranty he conveyed the same three pieces to Rodolphus Burt. Clough subsequently reconveyed to Goddard, and he afterwards sold and conveyed the same to the plaintiff, so that the defendant's rights as derived from Rodolphus Burt are to be determined by the deed from Goddard to said Rodolphus. There is no substantial difference, however, between the description of the three pieces as reserved in Goddard's deed to Clough, and their description in his deed to Rodolphus Burt.

No question is made but what the plaintiff owns all of the north half of lot No. 3 that is not conveyed by Goddard's deed to Burt, nor that the defendant owns all that *was* conveyed by that deed.

The only question is whether the deed to Burt conveyed the highway that lies adjoining to or over these several pieces, the pieces being separated only by the highway. The plaintiff claiming that the highway is not contained in the description in the deed, brought this action against the defendant for cutting the grass upon the highway adjoining his land.

There is not so much difficulty in determining what general rules are to govern, in deciding questions of this character, as there is in ascertaining what particular rule, or class of rules, shall govern a particular case. This must depend mainly upon the language used in the deed, and here the shades of difference are almost infinite. The result is that the decisions in the different States are not entirely harmonious. All these rules are subservient to the one grand principle that is applicable to all contracts or written instruments, which is, that the intention of the parties is to govern. The general principles that govern this class of cases as recognized in this State are well expressed by POLAND J., in *Buck v. Squiers*, 22 Vt. 484, as follows: "When one owns land adjoining to or abutting a highway, the legal presumption is, in the absence of evidence showing the fact to be otherwise, that such landowner owns to the middle of the highway; so also when one conveys land adjoining to or bounded upon a highway, (of which the grantor owns the fee,) the law

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presumes the party intended to convey to the middle of the highway, and will give the deed such effect unless the language used by the grantor is such as to show a clear and explicit intent to limit the operation of the deed, or grant to the side or outer edge of the highway, and in all cases where general terms are used in a deed, such as "to a highway" or "upon a highway" or "along a highway," the law presumes the parties intended the conveyance to be to the middle or centre line." *Newhall v. Ireson*, 8 Cushing 595. These rules are general, and are to be applied to particular cases, according to their various circumstances and the language used. They are based upon the intention of the parties, and that general policy that is opposed to the division of farms or large tracts of land by those narrow belts, that, as a general rule, can be valued only for the reason that they are a source of annoyance and contention, and can therefore be used as a means of extortion or the gratification of wrong feelings.

Still parties have the right to make their conveyances as they choose, and when the intention to exclude the highway is clear, explicit and unequivocal, it is the duty of the court to carry out their intention, but when the language is such that by a fair construction the intent is doubtful, it is the duty of the court to resolve that doubt so as to give to the deed the effect of conveying the land to the centre of the highway.

To apply these rules to the case now under consideration ; the description and boundaries of each of the three parcels is given in language wholly different from that used in reference to the others. The seventeen acre farm is bounded as follows : "Beginning on the west side of the road at the end of a wall, running westerly on said wall, and in a straight line therewith to the west line of lot No. 3. thence on said west line to the centre line of said lot No. 3, thence on said centre line to the road, thence on said road to the place of beginning." In this description there are three references to the highway. Two of them by the well established and universally recognized rules of construction apply to the centre or thread of the road ; the third speaks of the west side of the road as the place of beginning at the end of the wall. By this the party has fixed a definite, tangible and

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permanent northern boundary to this piece, such a boundary as he could not have in the centre of the road; and we think it was more for this purpose than with any reference to an intention to exclude the highway that this point was fixed, especially as in terminating the southerly line he carries it to the centre of the highway, and lays the easterly line upon the centre line of the road. The fixing of this boundary in the west line of the road, under the circumstances, is not such an expression of an intention to exclude the road as will control the other boundaries, and place the intention beyond reasonable doubt. If the party had entertained an intention to exclude the road, we think he would have expressed it more clearly in his deed. Taking the whole description together, we think the true legal construction to be put upon it is, that it includes the land to the centre of the highway.

In the case of *Buck v. Squiers ub. sup.*, the land was described as bounded on the west by a line running on the easterly side of the highway. The court then held that such language was too explicit to be controlled by the legal construction. If in this case the southerly line had by the terms of the deed terminated at the west line of the road, and had run thence on the west line thereof to the place of beginning, it would then have come within the case of *Buck v. Squiers*. As it is, the cases are entirely different.

In the case of *Cole v. Haynes et al.*, 22 Vt. 588, the question arose upon the construction of the levy of an execution. ROYCE J. recognized the rules of construction as applicable to deeds to the full extent, but distinguished that case from those where the questions arise upon deeds, on the ground that if the line as measured actually extended to the centre of the road "it was the officer's duty to certify the facts in express terms." As he had not done so the presumption would be that the line did not extend to or run on the centre of the road, and the court could not extend it by construction.

Another piece is described as "on the south side of the road opposite to the last mentioned piece, fenced on two sides, being a ridge of land lying between said road and the centre line of lot No. 3 to extend so far east as to make just five acres." In this description the road is referred to in general terms, without

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any thing to indicate that the expression was used as having reference to any other than the centre line. Being on the south side means by legal construction the south side of the centre. "Opposite to" simply means on the opposite side of such line. The clear legal construction of this description is that it conveys the land to the centre of the highway.

The other piece is described as "opposite to the last mentioned piece on the east side of said road within the fences or wall." This description does not necessarily locate the land as adjoining the highway. It is conceded, however, that it does lie upon the road and is bounded by it on two sides, and is opposite to both the other pieces. Taking this piece by itself and judging solely by the language used to describe it, there is some difficulty in saying that the grantor did not intend to make the fences, as they then stood, indicate the exact lines of the land conveyed. If this piece had been surrounded on all sides by other lands of the grantor, or by the lands of other individuals, there could be no question that such would be its construction. But in this case the lot described is in fact bounded by the highway. The legal presumption is in favor of extending the grant to the centre of the highway, and such is its operation unless a different intention is clearly expressed in the deed. In determining what the grantor intended by the language used in describing this particular piece, we are to look at the whole deed, and the situation and condition of the whole property conveyed, and construe the language used in reference to this piece, in view of that used in reference to the other pieces, and the general purpose and intention of the grantor as evidenced by the whole taken together.

These three pieces constituted originally but a single piece. They are separated only by the highway. On one side of the highway the land is, as we have seen, conveyed to the centre, and no reason is apparent for reserving the half of the highway lying on the other side of the centre. The probabilities are so strong against such an intention that nothing short of language so clear and explicit as to leave no doubt in the mind would warrant us in giving effect to such an intention.

The language used we think may fairly be said to have been used as referring to the whole lot, as identifying it generally as

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the lot that lay on the other side of the road, and for greater certainty it was referred to as the lot that was fenced, and not as intending to define its precise external limits ; and we think, that so far as this question is concerned, the deed is to be construed the same as though the lot intended had been identified as lying on the other side of the road and containing a certain number of acres, or in some other manner, without referring to the fences that surrounded it, and in such case there would be no question that the land would be conveyed to the centre of the highway.

On the whole, we are fully satisfied the true construction to be put upon this deed is that the description of each piece conveys the land to the centre of the adjoining highway.

Judgment of the county court reversed, and the case remanded.

REUBEN KIDDER v. JOSEPH J. SMITH.*Evidence.*

When the testimony is conflicting as to the price agreed upon in the sale of personal property, it is competent to show the value of the property at the time of sale, as tending to show what the real contract was.

BOOK ACCOUNT.—The facts sufficiently appear in the opinion of the court.

Converse & French, for the plaintiff.

A. P. Hunton, for the defendant.

POLAND Ch. J. The auditor reported a balance due to the defendant, and the county court rendered judgment on the report for the defendant, to which the plaintiff excepted. This result was produced by the disallowance of an item in the plaintiff's account by the auditor of twenty-five dollars for balance due on a horse.

The auditor reports that the plaintiff sold to the defendant a

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mare, for which the defendant paid the plaintiff thirty-five dollars. The plaintiff claimed that the defendant by the contract was to pay him an additional sum of twenty-five dollars by delivering to the plaintiff the colt with which the mare was supposed to be in foal, or if the mare brought no colt, or if defendant chose to retain it, to pay the twenty-five dollars in money.

The defendant claimed the contract to be, that in addition to the thirty-five dollars paid, the plaintiff was to have the colt if the mare brought one, that the plaintiff assumed the risk of the mare being with foal, and if she brought no colt the defendant was not to pay more than thirty-five dollars. The auditor found the contract to be as the defendant claimed, and also that the mare was not with foal at the time of the trade. It is not now questioned but that the county court decided correctly upon the facts reported by the auditor. But upon the trial before him the auditor allowed the defendant to prove, against the objection of the plaintiff, that at the time of the trade the mare was wholly without value; and the plaintiff now insists that this evidence was erroneously admitted by the auditor, and that therefore the judgment should be reversed.

It does not appear from the report for what purpose this evidence was offered or admitted. It might have been offered for the purpose of showing an entire failure of consideration for this item, and perhaps was legally admissible for that purpose; this is the view now taken of it by the defendant's counsel. However this might be, it does not appear from the report that this evidence was in any way used by the auditor in determining what the contract was between the parties.

But if it had been, we do not think it was erroneous. The parties were in dispute, and their evidence conflicting, whether the defendant was to pay thirty-five dollars or sixty dollars for the mare, and it became necessary to resort to circumstances and probabilities to determine which was right. As showing a probability in favor of the defendant's version of the trade, we think it was competent for the defendant to prove the value of the mare to be even less than the sum he agreed he was to pay. Where the disparity between the value of property, and what is claimed to have been the contract price, is small, and within the fair range

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of what different persons might esteem to be a fair value, such evidence would be very slight, perhaps too slight to be admissible, but when the difference is very great, and beyond the range of fair difference in judgment, it might be entitled to much weight, and the wider the difference, proportionably stronger would be the evidence furnished by it. See *Kimball v. Lock*, 31 Vt. 683, where the admissibility of this species of evidence is very aptly discussed and illustrated by BARRETT J., in the judgment of that case. But there is another ground on which the judgment below ought not to be disturbed on these exceptions. The exceptions are to the judgment of the county court in rendering judgment for the defendant on the facts reported. But it is conceded that that judgment was correct, indeed it was the only judgment the county court could render. If the court had been of opinion that the auditor erred in admitting this evidence, they could not have rendered a judgment for the plaintiff, but only have sent the case back to the auditor to be retried by him. But it does not appear that any exception was made to the auditor's report on this ground, or that the court were asked to recommit it. The parties proceeded to a hearing upon the report, and after a judgment upon it, it was too late to take advantage of an error that should have been met by a preliminary application.

Judgment affirmed.

STATE v. CHARLES WALKER.*Criminal Law: Confessions. Evidence.*

Confessions by a person charged with a crime made under promises or threats, inducing hope or fear, are not admissible in evidence against such person when on trial for the crime.

Where the owner of a factory, which the respondent was charged with burning, visited the respondent at his request in jail, and in course of the conversation told him he wanted he should tell the truth just as it was; that it would be better for him; that they had got Brierly, (another person charged

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with the same crime,) and probably they would both be tried that day ; that it would be better to tell the truth just as it was, for if Brierly should get the start of him it might go hard with him ; that he was a young man, and he had better tell the truth as it was ; and thereupon the respondent confessed the crime ; *Held*, the confession was made under such inducements of hope and fear as would exclude it on trial of the respondent for the offence.

This was an indictment for burning the factory of Thomas Greenbank, tried at December term, 1860, BARRETT J., presiding.

On trial by jury, the prosecution gave evidence tending to prove that a woollen factory building, owned by Thomas Greenbank, and situated in Gaysville, a village in the town of Stockbridge, in Windsor county, was burned in the night time between the 5th and 6th of August, 1860, the fire having been first discovered about one o'clock on the morning of August 6th :

The prosecution, also, gave evidence tending to show that one Brierly, sometime in June, had been employed by said Greenbank to work by the job in doing a department of the work in said factory in the place of one Andrews, who had theretofore been doing said work, and for whom the respondent had been at work ; that the respondent, who was quite a youth, being eighteen or nineteen years old, was employed by said Brierly in the same work ; that after working some ten days Brierly was discharged from said work, and said Andrews reinstated, and upon Brierly being thus discharged the respondent ceased to have employment in the factory, as Andrews would not employ him, by reason of his having been in the service of Brierly, towards whom Andrews had unfriendly feelings, on account of his having supplanted him in said work, as above stated ; that said Andrews employed in the place formerly filled by the respondent a young man by the name of Flint, towards whom the respondent felt disaffected on account of his having got the respondent's place in work as aforesaid, and some unkind remarks and treatment of said Flint towards him, growing out of this condition of things.

The prosecuting attorney then offered to prove a confession averred to have been made by the respondent, that he set the said building on fire, and that he was hired to do so by Brierly, and that he made such confession to Greenbank, while the respondent was confined in jail upon a charge of having burned

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said building ; and that thereafterwards, upon the examination before a magistrate of Brierly, on the same day, upon a change of having burned said building, the respondent being sworn as a witness repeated the statements that he had previously made to Greenbank.

The respondent objected to the admission of this testimony, and gave evidence to the court in respect to said alleged confessions, and the circumstances under which they were made, in substance as follows :

The said Thomas Greenbank testified that he first had conversation with the respondent upon the subject the next morning after the fire, and that he then asked the respondent whether Brierly had ever intimated anything to him about burning the factory ; that he replied he had not ; that the witness then went to the town authorities and had respondent arrested ; that they did not make out much against him, and let him go, and he was there two or three days, and proof seemed to be getting stronger, and the witness went to the town grand juror and the magistrate (Cozzens,) and told them respondent was going round leisurely and getting his board paid, and that, in witness' opinion, if they would try him again and put him in prison he would own up in two weeks ; that they did so ; that he (witness) told the grand juror that if respondent was put in prison, and away from folks, he would begin to consider, and if he knew anything, he would tell what he knew ; that they tried respondent and brought him to Woodstock jail ; (there was no evidence that respondent knew of what Greenbank thus said to the grand juror and justice ;) that Brierly had not then been arrested ; that the day respondent was brought to Woodstock, witness went to Boston and was gone four days ; that when witness returned home, his wife told him that the respondent had written him a letter, wanting to see witness, and owning up considerable, and saying that if witness would come down he would tell more ; that witness came to Woodstock the same night with Cozzens, and arrived there about nine o'clock in the evening ; that the next morning witness had an interview with the respondent in the jail ; that witness told him that he had come down as requested in his letter ; that he had come down to see what he had to say, and witness then testified

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substantially in these words: "I told him I wanted him to tell the truth just as it was; that it would be better for him; that we had got Brierly, and probably they would both be tried to-day, and it would be better to tell the truth just as it was, for if Brierly should get the start of you it may go hard with you; you are a young man, and it would be better for you to tell it just as it is; he said he would; I asked him how it was? I did not tell him I would help him all I could; money and helping was not mentioned; my meaning was that he should tell the truth just as it was; I meant by 'if Brierly should get the start,' &c., that if Brierly set him on, and he should be brought up for trial again, Brierly might try to throw it on him and get clear himself. I held out no inducements; I meant he should understand that if he had not much to do with it, and Brierly set him on, and he should tell the truth just as it was, it would be likely not to go so hard with him; I did not tell him we should want him for a witness against Brierly; I think before respondent was brought to Woodstock, while he was in the officer's hands, I told him if he knew anything he should tell it just as it was; I do not recollect of anything said that it would be easier; Andrews told him that it would be better for him to tell it right out; he didn't own up at Gaysville; I do not recollect of saying to him that it wouldn't go so hard with him if he would own up like a man; I may have appended such a remark; like enough; I don't recollect; I had no other talk except at jail, and at Stockbridge as above; I did not say to him if he would own up I would fix it so it would be easier for him; before going to Boston nothing had been said about his writing."

It appeared that the respondent was taken from jail by Morey, the officer, and carried to Stockbridge, the same day that he made the alleged confession to Greenbank in the jail, and that on the same day on the examination of Brierly before the magistrate, he was sworn as a witness and testified substantially as he had before the same day told Greenbank; and that the confession to Greenbank was made after all the conversation was had between Greenbank and the respondent as above stated. Greenbank was the owner of the factory which had been burned.

Upon this testimony the respondent's counsel insisted upon the

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objection taken to the testimony of the confession, either at jail or on the examination of Brierly. But the court being of opinion from the evidence that said confessions were made voluntarily by the respondent, and not by reason of inducements held out to him, and that he sought the occasion of making them by writing to Mr. Greenbank in the manner stated by him, overruled the objection, and testimony was given of the confession of the respondent, both to Greenbank in the jail, and upon the examination of Brierly, that he, the respondent, set fire to the factory, and was hired to do so by said Brierly. To all which the respondent excepted.

After a verdict of guilty, the respondent's counsel moved in arrest of judgment for the insufficiency of the indictment, which motion was, *pro forma*, and without hearing upon it, overruled by the court. To which decision the respondent excepted.

The substance of the letter from the respondent to Greenbank was this :

The respondent made statements of certain declarations by Brierly, and of certain of his acts, which, if true, would tend to connect Brierly with the burning,—but said nothing, which tended to show, that the respondent participated in the burning; and he closed by saying, that if Greenbank would come to Woodstock, he would tell him more.

At the beginning of the letter he, (the respondent,) expressed himself as having something that he wanted to say to Mr. Greenbank.

Washburn & Marsh, for the respondent.

William Rounds, states attorney for the prosecution.

PIERPOINT, J. The motion in arrest, we think, was properly overruled. The offence is charged in the language of the statute creating the offence and under which the indictment was found. This, as a general rule, is sufficient; there are exceptions to the rule, but this case does not come within any of them. The word manufactory has a clear and well defined meaning, and one well understood; no one could doubt what was intended when the

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indictment charged the burning of a manufactory. The meaning of the term is as well understood as that of house or barn.

The testimony introduced of the confession of the respondent, made to Greenbank, and his testimony before the examining magistrate, we think should have been excluded.

Since the case of the *State v. Phelps*, 11 Vt., the rule has been regarded as settled in this state "that a confession must never be received in evidence when the respondent has been influenced by any threat or promise," and in practice this rule has been rigidly adhered to, and its substantial correctness is not now questioned. But it is claimed that the evidence introduced in the court below, and which is spread upon the record, and under which the confessions were admitted, shows that no threat, promise, or inducement was made or held out to the respondent, that could have influenced him in making the confession; but that he acted voluntarily. In looking at the whole testimony we are led to a different conclusion. It appears that Greenbank, who was injured by the fire, had once caused the respondent to be arrested, that on examination nothing was proved against him, and he was discharged. Within two or three days, Greenbank induced the authorities to arrest him again, under the belief that if he was confined in jail, he would "own up," to use his own expression. He was again arrested and bound up, and for want of bail, was sent to jail. After he was arrested and before his examination, Morey, the officer who held the warrant, and had him in charge, told him that if he knew anything about the fire, either that Brierly had anything to do with it, or set him on, the best thing he could do was to own up before his trial, and told him that if he wanted to say anything to him (the officer,) and would tell, he would help him if he could. Within a few days after he was imprisoned he sends for Greenbank by letter, saying substantially, that he would give him information as to Brierly. When Greenbank went to see him, he commenced by saying to him "that he wanted him to tell the truth just as it was; that it would be better for him; that they had got Brierly and probably they would both be tried that day, and that it would be better to tell the truth just as it was, for if Brierly should get the start of you, it may go hard with you. You are

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a young man, and it would be better for you to tell it just as it is ; he said he would, etc." This is clearly holding out an inducement to make a disclosure of some kind. He is told that it will be better for him to do so. It is also intimated that if he does not, Brierly may, and that might injure him. How he was to be benefited in the one case or injured in the other, was not stated. This very uncertainty would not be without its effect on a young person situated as the respondent was ; he was suspected and in jail and wanted help. When told that help lay in a particular direction, he was ready to take that direction without stopping to enquire or consider, how it was going to relieve him, or whether that would probably be the result. Hope induces him to seize the first straw that comes in his way.

But it is said these were only inducements to *tell the truth*, and had no tendency to induce a confession that was not true. This is true to the ear of the respondent, but it is not so to his understanding. He has already asserted his innocence and on that stands committed for trial. He is now told that it will be better for him to tell the truth. Does he understand from that, or does the person making the statement intend him to understand, that it will do him any good to re-assert his innocence ? Certainly not. The person making the statement does it because he believes or suspects, he has not told the truth. And the prisoner understands, that whether he is innocent or not, it will in some way better his condition to tell a different story.

These inducements are rarely made to elicit what the party offering them supposes to be a falsehood ; the intention is good ; but this does not alter the effect. The prisoner acts upon them in view of the hope of benefit, that is held out, without reference to the motives that induced the offer, and under the circumstances is so likely to act upon them without much reference to the truth of his confession, that courts have uniformly refused to receive such confessions as evidence against him.

The representations that were made in this case, calculated to excite a hope of benefit, or fear of injury, were made by the person whose property had been destroyed, who was active in instituting and prosecuting the proceedings, and the one who the prisoner would most naturally suppose could benefit him in the

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matter, and although he sustained no official relation to the proceedings, still, he was so far interested therein and connected therewith, that when the confession was made to him it came clearly within the rule excluding it. The relation of the same story on the stand as a witness, made the same day, must be regarded as standing on the same ground with the confession to Greenbank, it was in fact only carrying out the suggestions of Greenbank, and doing what he considered necessary to avail himself of the anticipated benefits, and must have been made under the same influences.

Again it is said the judgment of the county court that the confession was voluntary, and admitting it as evidence, are conclusive and cannot be revised by this court.

There is a class of cases when the testimony as to the promise, threat, or inducement is conflicting, and when the county court must pass upon the character and weight of the testimony upon each side, in order to determine whether the confession is voluntary or not, that their decision would be final. But in a case like the present, where there is no conflict in the testimony, or dispute about the facts, the decision of the county court admitting the testimony may be revised in this court. It was in this manner that this question was brought before the supreme court in the case of the *State v. Phelps*, before referred to.

Judgment of the county court reversed, new trial granted and the case remanded.

CATHERINE SAWYER v. HARLEY COOLIDGE.*Deed. Ejectment. Construction. Evidence.*

Where a deed conveyed a tract of land "except eight acres on the south-west corner of said tract being the land where Jonas Coolidge now lives," and it appeared that the eight acres as occupied by Coolidge had definite limits and boundaries, at the time of the execution of the deed, which was known

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to the grantees, but the occupancy did not extend up to, and was not upon the true west line of the tract; *Held*, that without the words "being the land where Jonas Coolidge now lives," the exception would be construed to mean eight acres in the south-west corner on the south and west lines of the tract, but that with those words, it would be construed to mean eight acres as then occupied and possessed by Jonas Coolidge.

The acquiescence of the husband in line fences and boundaries of land will not affect the rights of the wife, when the land is her separate estate.

EJECTMENT for land in Plymouth. Plea general issue. Trial by jury, May Term, 1860,—REDFIELD, Ch. J., presiding.

The facts necessary for a proper understanding of the point decided sufficiently appear in the opinion of the court.

Exceptions by the plaintiff.

Washburn & Marsh, for the plaintiff.

——— *Fullam* for the defendant.

BARRETT J. The deed of John Coolidge dated June — 1813, conveyed to the plaintiff a certain described tract of fifty-three acres, from which eight acres was reserved. The plaintiff stands in this suit upon her rights acquired by virtue of that deed. The question is as to the location of that eight acres. In virtue of that reservation and the conveyance in 1822, by John Coolidge to Jonas Coolidge, Jr., the defendant asserts his rights in reference to the plaintiff's claim.

The reservation is of eight acres in the south-west corner of the land described in said deed to the plaintiff, and adds: "being the same land on which Jonas Coolidge now lives."

The south-west corner bound of the tract described in the deed to the plaintiff, was, and is, a fixed point, about which there is no controversy. The southern boundary of said tract was, and is, a fixed line, about which there is no controversy. It is proved that the western boundary at the time of said conveyance to the plaintiff was an old marked line, and no other line is shown to have existed. So there could be no doubt what line was meant in said description.

Hence if the reservation had been simply of *eight acres in the south-west corner of said described tract*, the southern and western

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bounds of said eight acres would have been parts of the lines each way from said corner bounding the main tract, and the other bounds would have been equal opposite lines subtending equal opposite angles.

This is so well settled as to render discussion unnecessary. The location and boundary of said eight acres, in this way, the plaintiff claims as her right in this suit. The defendant claims that the true western boundary of said reservation is, and should be held to be, a line starting from the south-west corner of said fifty-three acre tract, and running northwardly on a range bearing several degrees eastward of the said western line of said tract as described in said deed, and that the other bounds are, and should be held to be, equal opposite parallel lines subtending equal opposite angles.

The controversy in this case grows out of this difference of claim between the plaintiff and defendant.

It appears that John Coolidge, in 1791, pitched a parcel of land and caused it to be surveyed, and a plan of it to be made, and the survey and plan to be recorded, of which parcel said fifty-three acres described in his deed to the plaintiff, is the southern portion, and of which the western boundary was a line then marked, and is the same that bounds said fifty-three acres according to the description in his said deed to the plaintiff. As early as 1796 he went into possession of said pitch, as thus made and recorded, and thereafter by himself, and his grantees continued such possession. The jury have found by their special verdict that, between 1791 and the date of John Coolidge's deed to Jonas Coolidge, Jr., of the eight acres in 1822, all the proprietors holding land adjoining the west line of the "*interval lot*," (being said fifty-three acres,) by mistake or otherwise, supposed the line which the defendant claims, was the true west line of said "*interval lot*;" that under this belief the defendant has pitched and held the eight acres, &c.; that the first evidence of this belief was the pitch of thirteen acres in 1816, and of thirty-five acres in 1818, next west of said pitch of John Coolidge in 1791, and bounded on the east by the line which the defendant claims as the true western boundary of said eight acres.

It seems clear that the plaintiff could not be affected in her

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rights by the belief, sayings, or acts of her husband in reference to a mistaken boundary of her land, as described and conveyed in the deed of her father to her ; inasmuch as it does not appear that either he or she have asserted any rights predicated upon said mistaken line being the true line, as against the rights of the defendant in reference to said eight acres or as against any adjoining owner.

The plaintiff stands upon her rights under the deed conveying to her said fifty-three acres, with the reservation of said eight acres ; and after said conveyance, her rights under it could not be affected by anything that her father may have said or done as to his belief, or by way of recognizing said mistaken line as being the true western boundary of the land so conveyed to the plaintiff. The acts and sayings of her husband could no more become operative against her by way of acquiescence than in any other way ; and there is nothing of actual acquiescence on her part shown, or that she had any knowledge of, or part in, what was said and done by her husband in relation to the western boundary of said "interval lot." The effect of that reservation must therefore depend on its own terms in its application to the subject matter of it as the same was situated at the time the deed to her was given. John Coolidge obviously designed to reserve a certain specific piece containing eight acres. It appears that under an arrangement between said John and Jonas Coolidge, Jonas went on to the south-westerly part of said "interval lot," in 1807, erected a house and moved into it in November, and lived there ever after ; that by said arrangement John was to give Jonas ten acres, but afterwards concluded to let him have but eight acres. There is no question that said reservation by John in his deed to the plaintiff, was designed to cover the eight acres which Jonas was to have under that arrangement. It is a conceded fact that Jonas immediately commenced improving and occupying a tract limited on the south by the south line of the tract as described in the deed of John to the plaintiff, and on the west by the line which the defendant claims as the true line, and far enough north and east to make at least eight acres ; and in the language of the special verdict, "that under the belief that this was the true west line of the interval lot the defendants have pitched and held the eight acres."

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The case shows, and it was conceded in the argument, that no question was ever made by said John Coolidge or anybody else, but that said western limit of said eight acres, thus pitched and held by Jonas Coolidge and his grantees, was right and satisfactory.

It thus appears that at the time said John conveyed to the plaintiff, making said reservation "the piece of land on which said Jonas then lived" was definitely located and limited, particularly on its southern and western boundaries. This fact, taken in connection with the language by which said reservation was made, gives rise to the question as to the construction and application of that reservation in reference to the tract described in, and conveyed by, the deed in which said reservation is made.

If the reservation was only by a general designation, as being eight acres in the south-west corner of said fifty-three acre tract, the implication of law as to the intent of the party making it would be conclusive, and fix the location and boundaries as the plaintiff claims. But when to such a general designation is appended a specification of the precise thing intended, and it is shown that the thing existed answerable to such specification, the law then is equally conclusive, that the general designation shall be construed into conformity therewith.

Under these views, upon the fact of the pitch found by the special verdict to have been made in 1807, and the holding under the same from that time to the present, with an occupancy of said eight acres, always limited on the west by the line claimed by the defendant, as its true western boundary, we regard the judgment of the county court to be well warranted.

So far as these facts are concerned, it becomes unnecessary to discuss the propriety of admitting the evidence as to the declarations made by the husband of the plaintiff, as to the west line of the "interval lot," or the south-east corner of the thirteen and one fourth acre piece; for these facts, in their origin, history and proof, are entirely independent of any such declarations. They were equally independent of any of the evidence tending to show any adoption of a mistaken west line of said "interval lot," after the conveyance to the plaintiff, and of the instructions to the jury on the subject, either of the adoption by mis-

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take of such west line, or of its establishment by acquiescence.

If the jury had returned a general verdict for the defendant, or if the finding of the special facts upon which, in connection with unquestioned proof and facts conceded, we think the judgment should be maintained, had in any way depended on the objected evidence, or the instructions of the court, as to the recognition by mistake or otherwise, of a western line of the interval lot, different from that established in the original pitch, and named in the plaintiff's deed from her father, we might have found some difficulty in upholding the verdict.

In our apprehensions, upon the evidence as it is before us. the proper point to have put to the jury, as bearing upon the construction which the defendant claims for the reservation in question was, whether in point of fact, the eight acres on which Jonas Coolidge then lived, was a specific tract, with a defined occupancy, at the time John Coolidge conveyed to the plaintiff,—identical with that occupied and claimed by the defendant, at the time this suit was brought. Inasmuch as that fully appears by the special verdict and other unquestioned facts in the case, independently of, and unaffected by, any evidence or instructions of a questionable character, it is our duty to act upon it, in giving construction to the reservation, and upon the construction we thus give, the plaintiff would not be entitled, as in the language of the exceptions at the close she does not claim to recover.

The case furnishes material, out of which in view of some points made in the argument by the defendant, a much broader field of discussion might have been occupied,—but as the view thus presented seems to us to embrace the vital point in the case, and the only one on which he can stand, we have thought best to confine our present discussion within the present limits.

The judgment is affirmed.

Horton Ex'r. v. Baptist Church and Society in Chester et al.

NAHUM HORTON EX'R. v. BAPTIST CHURCH AND SOCIETY IN
CHESTER, *et als.*

Chancery. Interpleader. Corporation.

The parties defendants in a bill of interpleader stand before the court to litigate the questions of right pending between them, to the same extent as if one had brought a bill against the other predicated upon the same matter and for the same purpose.

When one of the defendants in a bill of interpleader was a church and society claiming property under a devise in a will, and the other parties were heirs at law of the testator contesting the validity of the devise, *held* that they being the real parties in interest, it was competent for them, without regard to the orator to make such an adjustment of the controversy as they might think best, and so end the suit.

When a church and society are an existing organized association acting in a collective *quasi corporate* character, an agreement of compromise of a suit by a majority of the members is binding upon the minority.

When after bill and answer, the parties agree upon a compromise and reduce the same to writing, it may be regarded by the court as tantamount to an amended answer, and as evidence of the facts embodied in it sufficiently to base a decree thereon.

This was a bill of interpleader, answer and traverse.

The parties defendants at this stage of the suit agreed upon a settlement, and submitted to the court the following statement of facts upon which to base a decree.

This bill was brought by Nahum Horton as the executor of the last will and testament of Abraham Sawyer, late of said Chester, deceased, against the heirs of said Abraham, and also against the First Baptist Church and Society, in said Chester. The heirs of Sawyer have made answer, which is traversed, which said answer is referred to and made part of the case. Said church and society have made no answer. No testimony has been taken by either of the parties.

It is conceded that the will of Sawyer was duly proved in the probate court for the district of Windsor, and that the orator gave bonds in due form of law, and entered upon the discharge of his duties as such executor, and so far completed the same that some three years since he advertised for a final settlement of his account in the probate court aforesaid, at which settlement

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the orator presented his account as such executor to said probate court, by which it appeared that, after paying the debts of the deceased, and some small legacies, and the expenses of the administration, there remained some real estate, consisting of a grist mill and water privilege, a small dwelling house, a few acres of land, valued from twenty to twenty-five hundred dollars, and also a small sum of money.

It is further conceded that the heirs of said Abraham, and also said church and society, (by their agents) appeared before said probate court, at the final rendering of said executor's account, as aforesaid, and said heirs claimed that said real estate, and money, should be decreed to them as intestate property, which claim was denied by said probate court, and, therefore, said heirs took an appeal to the county court then next to be held at Woodstock, in said county, which is still pending.

It is further conceded that, after various propositions between said heirs, and said church, relating to the property in controversy, it was finally agreed by and between said heirs and said church and society, that said heirs should pay said church the sum of eleven hundred dollars, and also pay all the legal taxable costs in both the present chancery suit, and said appeal from probate, as aforesaid; and should also pay the orator's solicitors the full amount of their charges in the present chancery suit, and the attorneys' charges in said appeal; and it is further agreed that said church and society, in consideration thereof, consented and promised to surrender to said heirs all rights to the estate which they might, in any event, claim under said will of Abraham Sawyer, and in pursuance of the foregoing agreements, said heirs have paid over to said church, and said church have received said sum of eleven hundred dollars; and said heirs have already paid over in part payment of said costs, and charges, in said chancery suit, and said appeal, the sum of two hundred and fifty dollars, leaving a balance still due, which they are ready to pay when the amount is ascertained; and it is further conceded that said church has directed their solicitor in this suit, to wit: William Rounds, Esq., to make no further defence, either in this suit, or in the appeal for them.

It is conceded by the heirs of said Sawyer that Hubbard

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Ingraham, John F. Hawks, George Wilson, Nahum Horton, Nathaniel Smith, and Jeremiah Rounds, are members of the Baptist society in Chester, and that as members of said society, they are dissatisfied with the course which has been pursued in relation to the property willed to said church and society, by Abraham Sawyer, late of Chester.

Also that Nathaniel Smith, Lydia Smith, and Susan Whitney, are members of said Baptist church, and, as members of said church, they are dissatisfied with the course which has been pursued in relation to the property willed to said Baptist church and society by said Sawyer.

It is also conceded by the heirs of said Abraham Sawyer that Nahum Horton, executor of said Sawyer's last will and testament, has always opposed, and still is opposed, to the pretended settlement which the heirs of said Sawyer claim to have effected with the said church and society; and that as executor of said will he has never consented to said supposed settlement, and that he is anxious that the provisions of the said testator's will be carried out.

It is further conceded that the whole number who subscribed the constitution of said society is fifty-six, and of this number twenty-eight have either died or moved away.

It is further conceded that there are now living and within attending distance of said church, and in regular standing, sixty-seven members who have signed a written statement that they are satisfied with said settlement, and that the whole number who belong to the church, and live within attending distance, is eighty-seven.

On the foregoing facts, REDFIELD, chancellor, at the May term, 1860, dismissed the bill *pro forma* without costs to any party except the executor.

The executor appealed.

Stoughton & Grant, for the orator.

L. Adams, for the heirs-at-law.

BARRETT, J. The bill in this case was obviously designed to be, and bears the leading characteristics, in its frame and

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prayer, of, a bill of interpleader, to procure of the court a determination whether the propety specifically devised to the Baptist church and society, belonged to said church and society, under the will, or to the heirs-at-law of the testator Sawyer, so that the orator, as executor of the will of said Sawyer, might, as between said parties, acquit himself of further liability, by making a disposition of it according as the right should be determined in favor of the one party or the other

It becomes unnecessary to discuss or determine several questions made, and others suggested in the argument; for, if it were to be assumed that the said heirs are entitled to the property, of course nobody could raise any question as between them and the church and society, in reference to the agreement as to the disposition of said property.

The case presents the two sets of claimants in the attitude of active controversy before the proper courts, asserting and seeking to maintain their respective hostile rights. The executor had proved the will, and had proceeded to administer and appropriate the estate conformably to the will, down to the point of making a final close, by relieving himself of the property specifically devised to the church and society. At this point the heirs of the testator interposed their claim to said property, on the ground that said devise could not be sustained in law. The matter having been heard and determined in the probate court, an appeal was duly taken by the heirs to the county court, where the case was pending for a due course of litigation, for the purpose of settling the controverted claim of right between the parties.

When the case there was ripe, and, in the course of the court, was about being reached for trial, the executor, conceiving that the peculiar powers of a court of equity were necessary in order to a full adjudication of all the rights, interests, and duties of the said claimants, and of himself as executor, brought this bill. Though as to questions of strict legal right between said claimants, the court of law might have had ample powers, still the decision of those questions might have been such, as to leave the matter in such plight as to have rendered necessary to the entire immunity of the executor, some authoritative direction as

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to the disposition of the property, which court of chancery alone was competent to make.

Assuming then the propriety of the course taken by the executor in bringing this bill, it is obvious that one effect of it was to transfer the forum of controversy between the claimants from the court of law to the court of chancery. When the defendants as hostile claimants were brought before the court of chancery, they then stood there to litigate the question of right pending between them to the same intents as if the one party had brought a bill against the other predicated upon the same matter, and for the same purposes.

Being thus before the court of chancery in the attitude of hostile litigants, they proceeded amicably to compromise and adjust the subject matter of the controversy. Both of said parties are before this court manifesting a willingness to abide by said adjustment, and to have the matter ended by such an order as shall at the same time carry out the adjustment, and direct a safe course for the orator, as executor, to pursue, in order to fully discharge his official duty under the will.

The orator is the only party of record that appears before us to object to the propriety and validity of that adjustment. Though we do not propose to put our decision upon the ground, that, in the posture in which he has placed himself as orator in this bill, he has no right to interfere as between the other parties in the litigation, or adjustment of the controversy between them, still it may be proper to give a moment's attention to the subject of the orator's position and prerogative in such a case.

It is laid down in the text books and illustrated by the cases, that, in a bill of interpleader, it is necessary that the plaintiff should state his own rights, and thereby negative any interest in the thing in controversy. Story Eq Pl §292. The very foundation of this bill is, that he is a mere holder of the stake which is equally contested by the defendants, and that he is wholly indifferent between them. Ib. §297. In *Hoggart v. Cutts*, 1 Craig & Phill. 204, cited in 3 Danl. Ch. Pr. 1753, Lord COTTENHAM said: "The definition of interpleader is not and cannot now be disputed. It is where the plaintiff says, I have a fund in my possession, in which I claim no personal interest, and to which

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you, the defendants, set up conflicting claims; pay me my costs, and I will bring the fund into court, and you shall contest it between yourselves. The case must be one in which the fund is matter of contest between two parties, and in which the litigation between those parties will decide all their respective rights with regard to the fund." See also the text *Ib.* 1759.

In recognition of these rules, the plaintiff brought this bill, and in substantial compliance with their requirements, representing himself as a mere indifferent stake-holder between the counter-claimants, who assert rights to the fund or property in his hands.

It follows hence, that when the contesting parties are brought before the court, the orator may then lay off, as the saying is, and quietly await the result of the conflict, being sure, that, so far as he is concerned, he will enjoy immunity in the conflict, and safety in the result.

The important question is, whether it was competent on the part of the church and society to enter into the compromise; for, though in the posture in which the orator stands in this bill, it is of no concern to him whether so or not, still it becomes the duty of the court, with reference to the rights of the parties under and in reference to the will, to see to it that the property is lawfully and properly appropriated.

It is to be assumed that, at the time said compromise was made, it was contingent upon the result of the pending litigation, whether the church and society, or the heirs of the testator would be held entitled to the property. If the church and society were entitled to hold it, it would be upon the ground that it was an association so constituted and organized as, in the eye of the law, to be capable of taking the devise in the manner, upon the conditions, and for the purposes specified in the will;—and it is clear that, according to the terms of the will, said church and society were primarily to be regarded both as trustee and *cestui que trust*. So that with reference to present rights, both legal and beneficial, said church and society were the only party in interest.

Now upon the assumption that is made in behalf of the orator as against the validity of that compromise, that said church and

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society were thus the sole party in interest, it is necessarily implied that that association is capable of doing all things necessary and proper for the protection of that interest.

This would seem to imply that, in a controversy pending, of which the result was doubtful, that must in any event, if prosecuted, be expensive, and which went to the very right of the association to hold any of the property, it was competent for the association to make terms of adjustment that should secure a substantial benefit, consistent with and in pursuance of the provisions of the will, free from the doubt that hung over the question of their right, and free from the hazard of having the whole property spent in litigation, so that the right, if ultimately established in its favor, would be barren and worthless.

It is no answer to say that the testator intended the church and society should have the whole property devised, and such a compromise is in violation of the provisions of the will;—for that is begging the very question that lies at the bottom of the controversy—it is assuming that the church and society are entitled under the will,—the very thing that the heirs deny—the very controversy which the compromise was designed to settle.

In a question of controverted right, of such a character as this we think it would be difficult to find a precedent in the adjudged cases, or to suggest a reason based on any recognized principle, that would stand in the way of the real parties in title and interest, legal and equitable, from entering into a compromise, instead of pushing the controversy through a course of sharp, persistent and expensive litigation—each subject to the hazard of final defeat in their respective claims of right, and both certain of being subjected to inconvenient, if not ruinous expense.

We see nothing in this case indicating any want of judicious discretion, and practical good faith on the part of the church and society, in reference to the intentions of the testator, as manifested by the provisions of the will. They realize eleven hundred dollars, clear of contingency and controversy, so far as their right to *take and hold* is concerned. As to the future management, use and application of the fund, there is at present no question before us,—nor could any be raised by the orator under this bill.

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Another question is made, viz: whether it appears that the church and society have really made a valid agreement, that the court ought to recognize,—and this is raised upon the fact that, four or five members of the association, and three members of the church are dissatisfied with the adjustment, and that the orator himself, as a member of the church, is also dissatisfied.

In this respect the orator stands only upon his rights as a member of the church, and has no more on account of his being executor of the will and orator in this bill. The point is, whether the non-concurrence and protest of these individuals can be regarded as effectual to prevent the church and society from entering into the compromise.

It is clear that the devise was to the church and society, as an existing organized association, in a collective, *quasi* corporate character. It is clear that the orator brought his bill with this idea of it in his own mind. It is clear that this must be assumed to be so, in order to uphold the devise either in respect to the legal title, or the beneficial uses provided for. The agreed statement of facts, assumes that such was the character and position of the church and society in its relations as *devisee*, and as a party to the controversy with the heirs.

Now that statement of facts says: "it was finally agreed by and between said heirs and said church and society, that said heirs should pay," etc. How agreed?—certainly not by going to each member, and making him a personal party by his several and independent assent,—but by the action of the church and society in their organized character—acting as an associated individual entity. This is the only idea which the law would recognize as imported by all the facts, and by the language used in setting forth the agreement. And in the absence of any showing to the contrary, the presumption is conclusive, that the action of the association in making that agreement was conducted in due form and in compliance with all legal requisites. It is then to be held that the agreement was made by a majority vote of the association regularly and properly taken; and if so, it is not to be questioned now, that such vote is valid, and renders the act thereby consummated, binding upon the association both as between the members thereof and also in reference to other

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parties with whom the association thereby contracts upon lawful and sufficient consideration. See Ang. & A. on corp., §499, and cases cited.

The dissatisfaction and dissent of the individuals named, therefore, in no way affect the validity of the agreement as an act of the association, whether it was expressed by voting against the proposition when the subject was acted upon by the association, or by protesting against such action after it had been taken and consummated.

In pursuance of these views, it only remains to indicate the proper disposition to be made of the case.

There is an apparent awkwardness in proceeding to a final decree, upon grounds that are not developed by the pleadings. Regularly, after the agreement of compromise had been consummated, that matter should have been brought upon the record by additional answers. It was not so done; but it was obviously the idea and intention of the parties, that, by filing the agreed statement of facts in the case, it would be treated as part of the record and in substitution of further answers.

For the purpose of avoiding delay in consummating this matter, we are disposed to treat it, as it was treated in the court of chancery, and regard this agreed statement of facts as tantamount to an answer of the parties to it, as also as evidence of the facts therein embodied.

The decree of the chancellor is therefore reversed. As to the property covered by the devise to said church and society, the orator is to be dismissed from the bill with his costs—to be made a charge upon said property. And as to that property, as well as to the residue of the estate in his hands not subject to disposition under the will, the same is to be surrendered, and delivered by the executor to said heirs of said Sawyer. And as to said heirs and said church and society, the agreement set forth in said agreed state of facts is to be confirmed, and the said parties thereto are to do, perform, and to hold and enjoy the said property conformably to said agreement, so far as the same is subject to the terms and provisions of said agreement,—and that as between said parties the matter of costs is to stand upon said agreement, and to be paid accordingly.

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JOB SANDERS v. JAY WILSON v. LEONARD K SANDERS.

Mortgage. Rents and Profits. Costs.

When the mortgagee took possession of the mortgaged premises, after breach of the condition of the mortgage, and held the same for a number of years, and the case was referred to a master to ascertain the rents and profits, who reported a great loss on the same in proportion to the value and condition of the premises, although he found the mortgagee exercised a most faithful stewardship in the management of the premises, *Held*, that although a mortgagee in possession is only bound to account for what he receives or might receive from the mortgaged premises, by the use of fair, reasonable diligence and prudence, and if the premises are rented, and rents lost by the failure of a tenant without fault of the mortgagee he is not liable to account, still when the mortgagee himself occupies, and especially when the premises is a farm under cultivation, upon which labor and expenditures are to be bestowed to produce annual crops and profits, the mortgagee will be charged with such sum as will be a fair rent for the premises, without regard to what he may in fact have realized as profits from the use of them.

Ordinarily the supreme court will not disturb the decree of the chancellor in respect to costs.

Under the circumstances of this case held the decree of the chancellor, denying the orator costs, was equitable and just.

Bill of foreclosure, filed at the November Term, 1857.

It appeared the orator was in possession of the premises in the years 1856,-7,-8,-9, as mortgagee after condition broken. The case was referred to a master to ascertain the rents and profits. The questions presented arose on the master's report, and the facts are sufficiently stated in the opinion of the court. Redfield, chancellor, at May Term, 1860, gave a decree of foreclosure to the orator with an allowance to the defendants of \$120 per year, for rents and profits, while the premises were in possession of the orator.

The orator appealed.

A. P. Hunton, for the orator.

————— for the defendant.

POLAND, CH. J. This bill was brought to foreclose a mortgage, executed by the defendant, Sanders, to the orator, on the

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17th of April, 1852, of a farm in Bethel, which he purchased of the orator, to secure the payment of a note of two thousand dollars, payable in ten years from date, with interest annually.

On the 9th day of August, 1855, the defendant, Sanders, conveyed the same farm to the defendant, Wilson, who assumed the payment of the note and mortgage to the orator.

In November, 1855, there being some interest due and unpaid on the mortgage note to the orator, he brought this bill returnable to the next December term of the court of chancery.

The defendant, Wilson, answered the bill, setting up that there was an outstanding mortgage upon the same farm of one thousand dollars, by the orator in 1845, and claiming that the same should be removed before the orator was entitled to a decree, or provided for in the decree, so as to save his rights.

This outstanding mortgage was paid and extinguished by the orator in September, 1857, as is now conceded by the parties.

In the spring of 1856, the orator believing, as he says, that the defendant, Wilson, did not intend to pay and redeem his mortgage, entered into the possession of the mortgaged premises, and has since carried on the farm, and taken the rents and profits to himself, and the case now stands only upon the questions arising upon the accounting by the orator for such rents and profits.

The case was referred in due course to a master to take the account, who returned his report, stating the account for the years 1856 and 1857. The orator, before the master, professed to have kept, and produced, an accurate and minute account of all services and expenses incurred in carrying on said farm for said years, and the report states that it was made up wholly from the account thus rendered by the orator. The master reported that the farm was carried on in a prudent and judicious manner, that the charges for labor and expenditures were just and reasonable, and that the produce of the farm was sold to the best advantage, and all accounted for; in short, the report states a most faithful stewardship by the orator, and a full and honest accounting for all the avails and products. The reports of the master upon the accounts for those years, however, showed, instead of a balance of profits, the unhappy result of a net loss for 1856, of \$170,83, and for 1857, of \$204,55.

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The cause was again referred to the same master to take the account for 1858, who reported the orator's account kept for that year, with similar favorable conclusions as to the orator's judicious and faithful management and honest accounting. The excess of loss for that year, was \$127,68.

A further reference to the same master, was made for 1859, who took the orator's account in the same manner, but upon the evidence, reduced his charges somewhat, and the balance of profits for that year, amounted to the sum of \$26,21.

The result of the account for the four years, showed a loss of \$476,85.

In the last of these reports the master states that the premises might have been rented for the sum of one hundred and fifty dollars a year, though he is of the opinion that the rents would have diminished from year to year under the occupation of tenants by the deterioration of the farm.

When the case came before the chancellor, the results of the orator's special accounting were so entirely unaccountable and unsatisfactory, that he refused to regard the same at all, but upon what the master reports as to the annual value, and other proof on that subject, allowed the defendant the sum of one hundred and twenty dollars a year, a sum just equal to the annual interest upon the principal of the mortgage debt. The defendant, Wilson, appealed from the decree, and both parties now claim that it should be reversed, and made more favorable to them. We entirely agree with the chancellor that the orator's special accounting before the master, and his finding upon it, are wholly unsatisfactory to the judgment, as forming any basis for a just and equitable decree. The premises were a valuable farm, the years were all years of plenty in general agriculture, and no reason appears for the peculiar and extraordinary result of the orator's management of the farm.

It may be accounted for to a limited extent, by the great depression in the market for hops, as there appears to have been by the account, quite an excess of charges above receipts, on the score of the hops, and this we do not doubt is true, as the state of the market for that commodity is a matter of public notoriety. But this furnishes no sufficient reason for the great loss on the

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whole farm, and for a series of years, and we are fully satisfied that there must have been a great failure either in the prudent and judicious management, and use of the premises, or in honestly keeping, and rendering the accounts before the master, and perhaps in both.

But we do not understand this to be the true rule and method of accounting for the rents and profits.

A mortgagee in possession is only bound to account for what he receives or might receive from the mortgaged premises by the use of fair, reasonable diligence and prudence, and if the premises are rented, and rents lost by the failure of a tenant, without fault of the mortgagee, he is not held liable to account.

But when the mortgagee himself occupies, and especially when the premises are a farm in cultivation, upon which labor and expenditures are to be bestowed, to produce annual crops, and profits, the mortgagee will be charged with such sums as will be a fair rent for the premises, without regard to what he may, in fact, have realized, as profits, from the use of it.

The rule is founded in sound policy, for the reason that the particular items of expenditure, in labor or otherwise, as well as the profits received, are wholly within the knowledge of the mortgagee, and if he is not disposed to render a full and honest account, it would be impossible for the mortgagor to show them, or to establish errors in the mortgagee's account.

The necessity and wisdom of the rule, were never, perhaps, more fully shown than in the present case.

It appears from the several reports and accounts appended, that the orator had expended considerable sums in improvements on the farm; in removing and repairing a barn, building a shed, hog pen, and new fences, more we think, than can properly be regarded strictly as repairs.

When a mortgagee goes into possession of the premises, for breach of condition, with full knowledge of the right to redeem, and where there is nothing to show but that the mortgagor desires and intends to redeem, he has no right to expend the rents and profits for anything but such as are strictly *necessary repairs*. If he go beyond this, and make *improvements*, though they are such as are beneficial to the estate, and such as a judicious and pru-

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dent owner would make for the benefit of it, he will not be allowed for them, for if he might thus expend the profits in improving the estate, instead of applying them to keep down the interest of the mortgage debt, it might operate to clog, if not to wholly prevent the mortgagor from redeeming, and in all transactions between mortgagor and mortgagee, equity is watchful for the interest of the mortgagor, as the weaker party and the one who deals at a disadvantage.

In the present case, however, we think the fact that the orator has made improvements beneficial to the estate, ought not wholly to be lost sight of, as enough of the rents and profits, have, by the chancellor's decree, been allowed to keep down the interest on the mortgage debt, so that has not been increased while the orator has been in possession, and if the defendant redeems, he will receive and have the benefit of whatever erections and improvements the orator has made upon the mortgaged premises. It is also to be recollected that the mortgaged premises were subject to an annual rent of \$7,50, which the orator has paid, and for which, of course, he is entitled to be allowed.

Upon the whole, we are satisfied that the sum allowed by the chancellor, is as near the true rule of justice as any we could fix upon, and that it effects substantial equity between the parties.

The chancellor also disallowed cost to the orator, of which the orator complains. This court will not, except under very special circumstances, disturb a decree merely on a question of costs. But we are satisfied fully with the decree in that respect. When the bill was brought the premises were encumbered by an outstanding mortgage from the orator, and we think the defendant had a right to ask that to be removed, or provided for, before the orator had a final and general decree of foreclosure. Since that was out of the way, the orator appears to have been persistently endeavoring to avoid a proper and just accounting for his administration of the mortgage estate. These are sufficient equitable reasons for refusing him a decree for costs.

The decree of the chancellor is affirmed and remanded to be perfected.

State v. Pratt.

STATE v. SAMUEL G. PRATT.

Liquor Law. Habitual Drunkard. When Private House becomes a Place of Public Resort.

When a witness testified that H. used liquor to excess at some particular times, and that he had seen him the worse for liquor some number of times, and another witness said H. is a dissipated man ; *Held*, that this evidence has a legal tendency to show that H. is an habitual drunkard, in the sense in which these words are used in section 1, page 19, Acts of 1853. But its sufficiency, in amount, is wholly a question for the jury.

An habitual drunkard is one who is in the habit of getting drunk, or one who commonly or frequently is drunk ; not that he is constantly or universally drunk.

Evidence that for a considerable period of time a very large number of persons had been in the habit of going to the defendant's house, many more than went to the houses of other persons in the same neighborhood, and many more than any business in which he was openly and honestly engaged furnished any occasion for ; that many of these persons came from other towns, called at unusual hours, and under suspicious circumstances, is competent to be left to the jury to prove that the defendant's house had become a place of public resort ; and if the defendant would avoid the effect of the presumption raised by such evidence, he must show some other reason for it, that being peculiarly within his knowledge.

Prosecution for violation of the act of 1852. to prevent traffic in intoxicating liquors for the purpose of drinking, which was brought into the county court by appeal. Plea not guilty, and trial by jury at the December term, 1860. The jury returned a verdict of guilty of three offences.

The facts in the case, and all questions arising on the trial, sufficiently appear in the opinion of the court,

Washburn & Marsh, for the respondent.

Converse & French, for the prosecution.

POLAND Ch. J. The respondent was tried in the county court upon a general complaint for violations of the liquor law, under which, by the statute, the jury may return a verdict for so many offences as are established by the evidence, and was convicted of three offences ; one for furnishing liquor to Ordway, and two for liquor furnished at his house to Davis and Hadley, and drank by them there.

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No question is now made but that the conviction was proper for the furnishing the liquor to Ordway. It appears from the exceptions that there was no direct evidence that the liquor furnished by the defendant to Davis and Hadley, and drank at his house, was purchased or paid for, and the prosecutor only claimed that the defendant was liable as for giving it to them. This having been done at the defendant's house did not make him liable to the penalty, unless it came within the provisions of the first section of the act of 1853, which provides in substance, "that a person shall not be liable for giving away intoxicating liquors at his own house, unless given to an habitual drunkard, or unless such dwelling shall become a place of public resort. The prosecutor claimed that the defendant was liable for the liquor given to Hadley, because he was an habitual drunkard, and for that given to Davis, because his house had become a place of public resort. No question is now made but that the court correctly defined to the jury what would constitute a man an habitual drunkard, or make a private dwelling a place of public resort; but the defendant insisted that there was no legal testimony introduced by the prosecution legally tending to establish either of those propositions, and that therefore the court should have directed an acquittal for those alleged offences; and that it was error to submit the case to the jury at all as to those charges. This requires us to look into the testimony, and to enable us to see just what the evidence was. The minutes of the presiding judge are attached to the exceptions. The only testimony as to Hadley being an habitual drunkard came from Davis and Dr. Richmond. Davis said: "Hadley used liquor to excess at some particular times; have seen him worse for liquor some number of times." Dr. Richmond said: "Hadley is a dissipated man."

The fair definition of *habitual drunkard*, as used in the statute, we suppose to be, "one who is in the habit of getting drunk, or one who commonly or frequently is drunk," and we do not suppose it necessary to satisfy those terms that a man should be constantly or universally drunk. The common term or phrase, *uses liquor to excess*, when applied to a person, is ordinarily understood to mean the same as saying that he gets intoxicated or drunk; and saying that such a person did so at particular times

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would generally be understood as meaning that these times occur about as often as he found an opportunity to do so. So the common understanding of the statement, that a man is a dissipated man, is, that he uses intoxicating drinks frequently and excessively ; in plainer terms, that he is often intoxicated.

The language of these witnesses, by the strict rules of lexicography might not necessarily mean quite so much as this, but the jury would have the right to understand the language in its common and popular sense, because they might well presume the witnesses used it in that sense, and they would also have the right to draw all fair and reasonable inferences from the facts stated by the witnesses.

We think this evidence did legally tend to show that Hadley was an habitual drunkard ; its sufficiency in amount was wholly a question for the jury.

In relation to the evidence as to the defendant's house having become a place of public resort, the evidence of several of the defendant's neighbors, who had proper means of observation ; proved that for a considerable period of time, a very large number of persons had been in the habit of going to Pratt's house, many more than went to the houses of other persons in the same neighborhood, and many more than any business in which he was openly and honestly engaged furnished any occasion for ; that many of these persons came from other towns, and many called there at unusual hours, and under suspicious circumstances.

We think the evidence makes just the case the statute intended, and raises a fair presumption that the true reason why the defendant was so favored with customers or visitors was because his house contained peculiar inducements and attractions, at least until the defendant should show some other reason for it, that being peculiarly within his knowledge.

If any error was committed in submitting the question to the jury as to Hadley's being a common drunkard, we do not see that there would be any necessity of reversing the conviction as to that offence, because the jury having found that the defendant's house had become a place of public resort, that would make him equally liable on that ground for giving to Hadley, as well as to Davis.

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The exception taken as to the admission of the evidence of Gay and Hadley having liquor in their possession after having been to the defendant's house, is out of the case, as the defendant was acquitted by the jury on that charge. The respondent's exceptions must be overruled.

AARON H. CRAGIN *et al.* v. LEWIS FOWLER AND DAVID T. CORBIN.

Patent. Promissory Note. Consideration.

A partial failure of consideration cannot be set up as a defence to a note.

Where the thing which was purchased was valueless as it was purchased, and for the purpose for which it was purchased, it is no answer for the vendor, in a suit upon the note given for the purchase money, to say to the vendee, you have, after all, got something that can be made useful in some different manner, or for some other purpose. The purchaser has a right to that for which he bargained, and it must be of some value, or he is not bound to pay for it.

ASSUMPSIT upon a promissory note. Plea the general issue, and trial by jury at the December term, 1860, BARRETT J., presiding.

The material facts in the case are sufficiently stated in the opinion of the court.

Washburn & Marsh, for the plaintiff.

Converse & French, for the defendant.

PIERPOINT, J. This action is upon a promissory note. The defence is failure of consideration. The note was given for the exclusive right to make, vend and use, in a portion of the State of Illinois, a patent broadcast seed-sower, which right was then owned by the plaintiff, and which he transferred to the defendants, on the execution of the note in suit.

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It appears from the original letters patent, with the specifications and drawings attached, and constituting a part thereof, that were introduced by the plaintiff, that it was the object, intent and purpose of the patentee to get patented a machine that would distribute seed evenly and rapidly, and be operated by horse power; the specifications and drawings are all made on that principle, and do not indicate any other method by which the machine was designed to, or could be made to operate, so as to accomplish the object.

The plaintiff also introduced evidence tending to show that after the patent was obtained, and before the sale, various machines were made according to the plans and specifications, all to be operated by horse power. There is nothing in the case to show that at the time of the sale any machines had ever been made, except such as were to be operated by horse power, or that the inventor or any other person had then entertained the purpose, or conceived the idea, of operating the machine by any other power. It is apparent that the only machine that the parties had in view as the subject matter of their contract, was to be operated by horse power. In that undoubtedly consisted its principal merit.

It is a matter of history that the farmers and inventors of the country have long sought for a machine that should sow seed properly, rapidly, and be operated by horse power; the great object being to save manual labor and time. Such a machine these parties undoubtedly supposed they had before them, and it was for the exclusive right to make, sell and use such machines, within certain limits, that this note was given.

The defendants' testimony tended to show, and the jury have found by their verdict, that machines constructed upon the principle described in the specifications, and according to the plans and drawings attached to and constituting a part of the letters patent, are entirely worthless.

To rebut the testimony introduced by the defence, the plaintiff produced testimony tending to show that sometime after the contract was entered into by these parties, it was discovered that by so reducing the dimensions of the machine that it could be carried by a man, and varying its construction so far as to admit of its being operated by hand, and without altering it in those par-

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ticulars, that were protected by the patentee, it could be used successfully, and would be of some value, and thereupon requested the court to instruct the jury that if the machine thus modified was of any value for use, there was not an entire failure of consideration, and that under the well settled rule in this state, that a partial failure of consideration cannot be set up as a defence to a note, the plaintiff was entitled to recover the full amount of it. The court declined so to charge, and in this it is claimed there was error.

Conceding that a hand machine may be constructed, including the same combination as the horse machine, so as to be protected by the patent, and that the hand machine so constructed would be of some value, still the right to construct and sell the hand machine was not what the parties contracted for; and although it does not appear that the grant specifically named horse power as that by which it was to be operated, yet the specifications describe, and the plans illustrate, a machine made to move upon wheels and to be moved and operated by means of power applied to it by a horse or other like animal connected with the machine by the appliances ordinarily used to connect such animals to wheeled carriages, with a seat attached to be occupied by the driver of the animal. With a machine constructed according to the plan, and that would operate according to the specifications, the entire labor of moving the machine and the driver, and of distributing the seed, is performed by the animal, and necessarily with great rapidity. The owner takes his place upon the machine, guides it as he chooses, and the desired labor is performed through the instrumentality of the machine and the horse. A machine that would thus operate, all can see would be of great value, and so the parties undoubtedly regarded it. In this case the jury have found that a machine constructed according to the plan will not operate according to the specifications, and is valueless, and consequently the right to make and sell such is also valueless.

The hand machine, although involving the same combination that is patented, is in all its substantial and most important and valuable features, an entirely different thing; instead of carrying the man, it must be carried by him; instead of being operated

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and having the seed distributed by the power of a horse, it must be done by the man. There can be no substantial saving, either of time or labor, by means of the hand machine. Again, the right to make and vend the hand machine constituted no part of the actual consideration of the note. The idea of making such a machine had not then been conceived; to originate and develop such an idea required inventive genius and mechanical skill. The purchaser is not required to bring these qualities to bear in order to construct a different machine, to give value to and to avail himself of, that which he had purchased, and which, as he purchased it, was valueless.

If the hand machine had been constructed at the time of the purchase, so as to have been in the contemplation of the parties at the time, and have constituted a part of the consideration, the case would have presented a different question; there would then have been only a partial failure of consideration.

Here there is an entire failure of consideration; that which was purchased was valueless as it was purchased, and for the purpose for which it was purchased, and it is no answer to say, "although this is true, you have, after all, got something that can be made useful in some different manner or for some other purpose." The party has the right to that for which he bargained, substantially, and it must be of some value, or he is not bound to pay for it.

But it is said that if the defendant is allowed to avoid the note, he still retains the right to make and sell the hand machines under his grant. We think if the defendant should attempt to do this, after having repudiated and avoided the contract on his part, the plaintiffs' counsel would soon devise some method that would effectually protect the rights of the plaintiffs in this respect.

Judgment of the county court affirmed.

 Deering v. Austin

THEODORE A. DEERING V. ISAAH AUSTIN.

Trover. Conversion.

✓ The law is too well settled in this State to be departed from, that one who purchases personal property of a person having it in possession, but who is not the true owner, and has no right to sell it, and takes possession, claiming title to it as owner, and puts it to use, is liable in trover to the owner, without demand or notice; although he purchased it in good faith, of one he supposed to be the true owner, and entitled to sell it.

But where the defendant took a cow of W., who was not the owner of the cow, but of this the defendant had no knowledge, to keep through the winter, under a contract that he might buy her in the spring, if W. did not pay him for her keeping, it was held that the defendant could not be regarded as a purchaser of the cow, or as claiming a right to her as owner.

W. who was the owner of a cow, on the 30th of August, 1859, turned her out to the plaintiff as security for a debt which he owed him, and delivered her into his possession, and the plaintiff kept her until October 30th, 1859, when W., not having paid the debt to the plaintiff, wrongfully took the cow into his own possession, and contracted with the defendant, who had no knowledge but that W. was the rightful owner, to keep the cow for him through the ensuing winter for eighteen dollars, with a provision that if W. did not pay the eighteen dollars in the spring, the defendant might purchase the cow and pay W. twenty dollars for her. December 3, 1859, the plaintiff sold his interest in the cow to one Fowler, who called on the defendant April 12, 1860, notified him of his title, and demanded the cow. Defendant refused to give her up. Except this there was no evidence of any conversion by the defendant, and it was held, that this was no evidence of a conversion in this suit, although it might have been in a suit in the name of Fowler.

This was an action of trover for a cow; plea, the general issue, and trial by jury, at the December Term, 1860,—BARRETT, J., presiding.

To sustain his title to the cow, the plaintiff gave in evidence a writing, signed by one Whitney, dated August 30, 1859, by the terms of which, the said Whitney turned out to the plaintiff the cow in question, to secure him for \$15, which Whitney owed the plaintiff, and Whitney had the right to redeem the cow by paying the plaintiff the \$15, on or before October 30th then next. At the time this writing was given, Whitney was the owner of the cow.

The defendant gave in evidence, a writing signed by the plaintiff, of which the following is a copy :

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“ East Bethel, December 3d, 1859.

This certifies that I have this day sold to Alonzo Fowler all claim, demand, and interest, which I have in a red, four years old cow, which was given and turned out to me by George H. Whitney, as security for the payment of fifteen dollars, the receipt of which from the said A. Fowler I hereby acknowledge, and I will so far assist him in obtaining possession of said cow as possible, without making cost for myself, which he may do in my name or otherwise.”

(Signed)

“ T. A. DEERING.”

On the back of this paper was the following:

“ If this proves to be good, I am to pay Deering fifty cents more.”

The plaintiff took possession of the cow under the contract of August 30, 1859. The plaintiff testifies that he had no interest in the cow after the writing, dated December 3, 1859, was given, and that he had no interest in this suit, it having been brought by Fowler in his name without his knowledge. It appeared that on the 3d of December, 1859, and for some time previous, the cow was not in the plaintiff's possession, but had been before that time taken by Whitney, but, as the plaintiff gave evidence tending to prove, wrongfully, and without his consent. Upon this testimony, the defendant requested the court to charge the jury that the plaintiff was not entitled to recover, even though the defendant had converted the cow to his own use previous to December 13, 1859, but the court declined so to charge, to which the defendant excepted.

The plaintiff gave evidence tending to prove that the cow was in possession of the plaintiff from August 30, 1859, until October 30, 1859, when Whitney, not having paid the money named in his contract to the plaintiff, took the cow from the plaintiff without his consent, and against his will, and drove her to Tunbridge, where the defendant then resided, and that an agreement was made between the defendant and Whitney previous to December 3, 1859, that the defendant should keep the cow for Whitney through the winter, and have the right to purchase the cow at the expiration of foddering time, by paying for her the sum of twenty dollars, unless Whitney should at that time, pay to the

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defendant eighteen dollars for keeping the cow through the winter ; that the defendant took the cow under this arrangement, and claimed title to her, and the right to hold her as against others, and refused to surrender her to Fowler. It appeared that Whitney resided in the same house with the defendant, but not in the defendant's family, and had the entire use of the cow. The defendant requested the court to charge the jury, that even if such arrangement, as the plaintiff's testimony tended to prove, was made between the defendant and Whitney, previous to December 3, 1859, and the cow was therefore taken upon the premises of the defendant, and there kept, it would not constitute a conversion. But the court charged the jury, that under such circumstances, the defendant would be guilty of a conversion of the cow, previous to December, 3, 1859, provided the jury found that the defendant, previous to December 3, 1859, either claimed a title to the cow, as a conditional purchaser, or claimed a lien upon her for the expenses of her keeping, and in pursuance of such title, or claim, took possession of, and held her as against other claimants, and that for this purpose, they might consider the acts and declarations of the defendant in respect to the cow, subsequent to December 3, 1859, and previous to, and at the time of, the commencement of the suit. It appeared that Fowler received the cow from the defendant within three days after the commencement of the suit, and had ever since retained her.

To the refusal of the court to charge as requested, and to the charge as given, the defendant excepted.

Verdict for the plaintiff for nominal damages and costs.

Charles M. Lamb, for the defendant.

Denison & Henry, for the plaintiff.

POLAND, Ch. J. If there had been a conversion of the cow by the defendant, before the plaintiff made sale of her to Fowler, the action therefor was properly brought in the plaintiff's name. The mere right of action could not be transferred so as to enable Fowler to sue it in his own name. Nor do we perceive any want of proper authority in Fowler to sue in the plaintiff's name ;

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the writing executed to Fowler expressly authorizes it, and it is not a question the defendant has a right to make, so long as the plaintiff makes no objection.

The more important question in the case is, whether there was any proper evidence in the case upon which a conversion of the cow by the defendant could have been found, prior to the 3d of December, 1859, when the plaintiff parted with his title to Fowler. For any conversion after that time, the action must be brought by Fowler, who had become the owner of the property,

The facts, as stated in the bill of exceptions, appear to be as follows : Whitney, who owned the cow on the 30th of August, 1859, turned her out to the plaintiff, as security for a debt of fifteen dollars, and delivered her into the plaintiff's possession, who kept her till the 30th of October, 1859, when Whitney, not having paid the fifteen dollars, wrongfully retook the cow from the plaintiff, into his own possession, and drove her to Tunbridge. Whitney thus having the cow in his possession as the apparent owner, at some time prior to December 3, 1859, contracted with the defendant, who had no knowledge but that Whitney was the rightful owner, to keep the cow for him through the ensuing winter, for the sum of eighteen dollars, with a provision, that if Whitney in the spring did not pay the eighteen dollars, the defendant might purchase the cow, and pay Whitney twenty dollars for her. Under this contract, the cow went into the possession of the defendant, before the 3d of December, and was kept by him through the winter, Whitney living in the same house with the defendant, and having the sole use and benefit of the cow.

About the 12th of April, 1860, Fowler called on the defendant and demanded the cow, when the defendant refused to surrender her, and said his claim to the cow was sure, for he bought her of Whitney, two or three weeks before Fowler bought her of Deering, the plaintiff. Except this, there was no evidence of any conversion by the defendant, and after this suit was brought by Fowler, the defendant gave up the cow to him. The court charged the jury, that if they found that previous to December 3d, the defendant claimed title to the cow, either as a conditional purchaser, or claimed a lien upon her for the expense of keeping, as against other claimants it would be a conversion. It does not appear there

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was any evidence of any claim whatever by the defendant prior to December 3d, except that the cow was in his possession under said contract with Whitney, and what may be inferred from what he said to Fowler in the April following about having purchased her.

It seems to have been held in this state as early as the case of *Riford v. Montgomery*, 7 Vt. 411, that where one purchased personal property of a person having it in possession, but was not the true owner, and had no right to sell it: and took possession claiming title to it as owner, and put it to use, that this was an actual conversion, and made him liable in trover to the owner without any demand or notice, though he purchased in good faith of one he supposed to be the owner, and entitled to sell it. This same principle seems also to have been held in *Grant v. King et al.*, 14 Vt. 367, and *Swift v. Moseley et al.*, 10 Vt. 208. This certainly seems a very harsh doctrine, that an honest purchaser of property from one in possession, professing to be the owner, and whom he supposed to be the owner, who has been guilty of no other act of conversion except to hold possession, and claim title as owner, as he honestly supposed himself to be, should be made liable for a wrongful conversion of the property, and subjected to an action therefor, until the real owner had first made known his title to him, and called upon him to surrender the property; but perhaps the principle is too well settled in this state to be now departed from. We certainly do not feel inclined to extend the doctrine beyond what has already been decided.

The courts in many other states hold a different, and more reasonable rule on the subject. In *Parker v. Middlebrook*, 24 Conn. 207, it was held that the purchase of property under such circumstances, and holding possession as owner under such purchase, was not of itself a conversion of the property, and did not subject such purchaser to an action until a refusal to surrender the property, after notice of the owner's title. Other cases cited by the defendant's counsel show that this rule prevails in several other states, and it seems to have been recognized by the English courts. If the question were new we should regard this as the more reasonable rule.

But does the present case come within this rule? The plaintiff claims that what the defendant said to Fowler in April, was

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evidence from which the jury might properly have found that the defendant had purchased the cow and held possession of her, claiming to own her before the first of December. But by reference to the exceptions, it fully appears that the plaintiff did not claim any such thing at the trial; his own evidence, as well as that of the defendant, proved it was not so. The defendant had possession of the cow under his contract to keep her through the winter for Whitney, with the condition that he might buy her if Whitney did not pay for the keeping; and it is perhaps fair to presume that he claimed whatever he was entitled to under the contract. There was no evidence that he claimed or said anything about his right; there was no occasion for him to do so, as no person appeared to make any question as to Whitney's right to the cow. But under this contract the defendant could not be regarded as a purchaser of the cow, as claiming a right to her as owner. He had no right to become the owner of her at all if Whitney paid for her keeping, and if he did not, then it was optional with the defendant whether he would purchase her. We think it can be regarded as no more than this, that the defendant had the cow in his possession under a contract to keep her for Whitney. The condition about the purchase seems rather to have been a mode of security for the keeping than a sale.

The refusal of the defendant to surrender the cow to Fowler, on being notified of Fowler's title, was undoubtedly a conversion, and would have subjected him to an action by Fowler, but not to the plaintiff, who had parted with his title to Fowler long before. His declarations to Fowler can be regarded only as admissions as to how he held the cow before December 3d, and though in the absence of anything else in the case they might have warranted a finding that he purchased the cow then of Whitney, yet all the evidence of both parties proved that was not true, and it was not claimed to be. It does not follow at all that because the defendant refused to give up the cow in the spring, after he had kept her through the winter, that he would have so refused before December 3d, if he had then been called upon. We are of opinion that there was no proper evidence tending to show a conversion of the cow while the plaintiff owned her, and that the jury should have been so directed.

Judgment reversed and the case remanded.

Holden v. Shattuck.

JAMES F. HOLDEN v. ANDREW J. SHATTUCK.

Highways. Restraint of Domestic Animals. Negligence.

The owner of lands through which a highway is established, retains the fee of the soil embraced within its limits, with the full right to its enjoyment in any manner not inconsistent with the enjoyment of the easement by the public for the purposes of a highway; and this right is exclusive against all other persons.

Under the recent statutes in this state, the law is, as it ever has been in England, that the owner is under no obligation to fence his land along the highway; the obligation in this respect being limited to his duty to restrain his cattle from trespassing upon his neighbors.

Therefore, the mere fact of a domestic animal being in the highway, unattended by its owner or servant, cannot be regarded as unlawful, or a breach of duty, rendering the owner liable for injurious consequences that may accidentally flow therefrom.

In order to constitute the presence of such animal in the highway adjoining the owner's land, wrongful on the part of the owner, it should appear that the circumstances and occasion, or that the character and habits of the animal, were known to the owner to such an extent as to warrant the finding of the fact of carelessness on the part of such owner, in reference to the convenience and safety of the traveling public.

CASE. The declaration alleged that the defendant carelessly and negligently suffered his horse to be at large in the highway, whereby the horse of the plaintiff, which was traveling along the same highway, harnessed to a wagon, was, by the misconduct of the defendant's horse, rendered so restive, frightened, and unmanageable, that he ran out of said highway, and was greatly damaged. Plea, the general issue, and trial by jury, May term, 1860, REDFIELD, Ch. J., presiding.

On trial, the plaintiff gave evidence tending to prove that he was traveling from Springfield to Mount Holly, with a three years old colt harnessed to a wagon, and that while passing along the highway, in the town of Weston, he saw the defendant's horse upon the roadside, feeding upon oats across the fence; that as he came opposite to the horse of the defendant, it suddenly turned and reared and came at the plaintiff's horse as though about to jump on to him, and made demonstrations as though to bite and kick the plaintiff's horse, and then turned and

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came into the highway near to, and ahead of, the plaintiff's horse and trotted ahead for some ten or twelve rods, and then commenced running; that the plaintiff's horse endeavored to keep up, and broke into a run, but the plaintiff restrained it after running five or six rods; that sixty-five rods from where the defendant's horse first turned upon the horse of the plaintiff, the defendant's horse turned off the highway, on to a road leading therefrom, at right angles, and after passing about twelve rods, stopped; that the plaintiff's horse wanted to follow and attempted to do so, but the plaintiff succeeded in driving along the highway without difficulty, but that the horse, after passing the cross road, was excited and inclined to go fast, and frequently turned its head and looked back, and that on arriving at a small sluiceway in the road, two hundred and two rods from where the defendant's horse turned off, it suddenly flung its head round, sprang forward, kicked and broke the shafts of the wagon, and ran, cutting its legs and damaging the harness and wagon. The plaintiff's testimony also tended to show that his horse was three years old, well broken, and had no unsteady or bad tricks, and that the defendant's horse was in the highway with his knowledge and consent, and was high spirited and accustomed to bite and quarrel with other horses.

The defendant's evidence tended to prove that the plaintiff's horse had before kicked when driven in a wagon, and was not well broken and steady, but was shy about passing bridges, and afraid of boards or new timber beside the road; that on the day in question, the defendant turned his horse into his pasture, where he saw it but a short time before it was so found in the highway, and that the pasture was a safe place to put and keep the horse; that the horse was peaceable and not accustomed to jump, and that the defendant did not know the horse was in the highway until just as the plaintiff came along, at which time the defendant was in a hay field some two hundred rods distant. The defendant's evidence further tended to show that his horse, when opposite the plaintiff, made no such demonstrations as the plaintiff's evidence tended to show, but that it turned quietly into the road ahead of the plaintiff's horse and trotted along in advance until it came to a little rise in the highway, when it fell

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into a walk, and so continued, until, arriving at the top, it turned on to said cross road, and cantered about twelve rods and stopped, and did not again return to the highway ; that the plaintiff's horse walked a portion of the way after passing the cross road, and before arriving at the sluice way, where the injury occurred, and that after passing the cross road the plaintiff had no trouble in managing his horse until it suddenly started upon the sluice way.

The defendant requested the court, to charge the jury as follows :

1. That if the defendant exercised ordinary care and diligence in the keeping of his horse, and that if it was out on the day of the accident without his knowledge, the plaintiff could not recover, although the accident was occasioned by the defendant's horse

2. That if the accident was the result partly of the misconduct of the defendant's horse, and partly of the misconduct of the plaintiff's horse, the plaintiff could not recover, although the defendant knowingly permitted his horse to be at large in the highway.

3. That the defendant's horse passing along the highway, ahead of the plaintiff's horse, whether trotting or running, or both, was not such misconduct as would entitle the plaintiff to recover, although the defendant knowingly permitted his horse to be at large in the highway.

4. That if the accident was not the necessary and immediate result of the misconduct of the defendant's horse, the plaintiff was not entitled to recover, although the defendant knowingly permitted his horse to be at large in the highway.

5. That if the accident was not the necessary result of the misconduct of the defendant's horse, the plaintiff is not entitled to recover, although the defendant knowingly permitted his horse to be at large in the highway.

6. That if the accident was not occasioned by the misconduct of the defendant's horse, the plaintiff is not entitled to recover, although the defendant knowingly permitted his horse to be at large in the highway.

7. That if the defendant's horse was guilty of misconduct when the first turned from where he was eating oats beside the road, and not afterwards, and the accident happened after the plaintiff

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had traveled two hundred and sixty-seven rods from that place, that then the plaintiff could not recover, although the defendant knowingly permitted his horse to be at large in the highway.

8. That if the plaintiff traveled two hundred and two rods after the defendant's horse left the highway on which he (plaintiff) was traveling, and before the accident, that the plaintiff could not recover, although the defendant knowingly suffered his horse to be at large in the highway.

9. That if the plaintiff's version of the transaction was true, the plaintiff was not entitled to recover, although the defendant knowingly suffered his horse to be at large in the highway.

The court charged the jury in compliance with the defendant's first request, except adding the words "or fault," next after the word "knowledge." They also charged the jury according to the defendant's second, fourth, fifth and sixth request.

In regard to the third request, the court told the jury that it was matter of fact for them to determine, whether the defendant's horse conducted in such a manner as to render the plaintiff's horse excited and unmanageable, to such an extent as, in spite of all the plaintiff's efforts, he possessing and exercising reasonable and ordinary skill, care and prudence, to produce the injury to the plaintiff's horse, harness and wagon, complained of, and that no precise rule of law could be given, as to what particular conduct of the defendant's horse would produce such a result. The jury were told, too, that if the plaintiff's horse, harness or wagon, were not reasonably safe to drive upon the highway, and such as prudent men would regard as ordinarily safe to be used in that way, and the accident was in any manner or degree attributable to such defects, the plaintiff could not recover. But that if the jury were satisfied the defendant's horse was at large with his knowledge, or through his want of ordinary care in restraining him, and his meeting the plaintiff's horse so excited it as to be the direct and immediate cause of the injury complained of, before the plaintiff, in the exercise of ordinary care and skill, could quiet or control it, the plaintiff would be entitled to a verdict.

In regard to the seventh, eighth and ninth requests of the defendant, the court told the jury that it was matter of fact for

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them to determine, whether the plaintiff's horse did in fact become quiet and manageable after meeting with the defendant's horse, and before the accident, in the manner the defendant's testimony tended to show ; if so they should give a verdict for the defendant, since the natural inference would then be that some other exciting cause intervened to produce the injury. The jury were told also, that there was a natural improbability resulting from human experience that such an accident should occur from meeting another horse, after the plaintiff's horse had gone more than half a mile ; but it was possible the excitement and terror might continue until it resulted in the accident and injury complained of, and if they so judged from all the evidence and probabilities in the case, they would so find.

The defendant excepted to the refusal to charge as requested, and to the charge as given in relation to the points involved in such request.

Verdict and judgment for the plaintiff.

Andrew Tracy, for the defendant.

I. The defendant was bound to exercise ordinary care and diligence only in keeping his horse.

II. The charge, as given, in answer to the defendant's first request, held the defendant to a higher measure of diligence.

It required him, in effect, to absolutely restrain his horse, else the words " or fault," are without meaning.

III. The charge, in answer to the third request, was erroneous. It makes the defendant liable, though his horse had been at the time standing still or grazing beside the highway, if the plaintiff's horse was thereby excited and so the injury happened.

This would make the defendant liable without any fault on the part of his horse, except that it was a horse.

IV. It was error to instruct the jury that the defendant's ninth request presented only a question of fact, or " fact and construction," if the word construction, as used here, means anything. 16 U. S. Dig. 468, §35.

V. The law is, as claimed by the defendant, upon the facts stated in his several requests, and the court should have charged in conformity therewith.

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1. Because no action can be sustained upon such a state of facts. 15 Vt. 404, *Cogswell v. Baldwin*. 1 Chit Pl. 55. 13 Johns 339, *Vernon v. Sawyer*. 1 Bac. Ab. 118. 14 U. S. Dig. 9, §13. 2 Salkeld 662, *Bruzendie v Sharp*. 4 Camp 198, *Beck and wife v. Dyson*. 5 Law and Equity 514, *Hudson v. Roberts*.

2. Because the defendant had a lawful right to let his horse run in the highways, at least upon his own lands.

By the common law horses are commonable. 2 Bac. Ab. 261, Tit., of common appendant.

There is no statute restraining them, except as to villages.

Chap. 15, Comp. Stat. 122, sec. 81, authorizes towns to make by-laws restraining any animals from running at large, but there is no evidence in the case that the town of Weston ever acted upon the subject, or made any by-laws.

3. The declaration alleges that the defendant was bound to restrain his horse.

This was a material allegation, and proof of it was essential to the plaintiff's right of recovery under his declaration.

The case is destitute of such proof.

J. F. Deane, for the plaintiff.

BARRETT, J. The declaration in this case counts upon the neglect, on the part of the defendant, of his duty to restrain and take care of his horse, and keep him from being at large in the highway, through which neglect, the said horse, being at large, with great force and violence started, and ran about and before the horse of the plaintiff, which thereby became restive and frightened and ungovernable, and ran along said highway, and by reason of such fright ran out of said highway, and became damaged, etc.

There is no averment of any vicious quality or habit in the defendant's horse, known to the defendant. The only fault alleged against him consists in letting his horse, through negligence and carelessness, be in the highway, in violation of his duty to restrain and keep him out of the highway. The residue of fault charged consists in the conduct of the horse in running about and before the horse of the plaintiff, as he was driving along said highway.

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The evidence shows that the defendant's horse came out of his lot through a door-way, that, as the jury have found, got open through the carelessness of the defendant, and was feeding from the road side of the fence on the oats of the defendant growing on the other side, when the plaintiff was driving along the highway lying through the defendant's farm. It also shows that all the faulty conduct of the defendant's horse, as charged in the declaration, occurred along the highway within the limits of the defendant's adjacent land. It contains nothing tending to show that the defendant had any knowledge of any vicious or roguish trick or propensity in the respect complained of, or indeed, that he had any such propensity or trick, save that on a single prior occasion, when he happened to be in the highway, he pranced about, as another horse was passing along.

The whole trial, including the charge of the court, proceeded upon the assumption that the defendant had no right to have or permit his horse to be loose in the highway, and that if he was there through the carelessness of the defendant, he, the defendant, was liable in law to respond any damage that should be caused thereby.

If this is the true view of the subject, we should have no great difficulty in upholding the verdict under the charge in its relation to the evidence given on the trial.

Under the last of the series of requests made by the defendant for a charge, the question is directly raised, whether the law, as to the duty of the defendant to restrain his horse from being in the highway, was warrantably assumed to be as was held by the county court, as the basis of the right of action set forth in the declaration.

It is too familiar to warrant debate, that the owner of land, through which a highway is established, retains the fee of the soil embraced within its limits, with the full right to its enjoyment in any manner not inconsistent with the enjoyment of the easement by the public for the purpose of a highway. He has the right to the herbage, and whatever else is of value, to any extent not infringing the proper maintenance and use of the public thoroughfare; and this right is exclusive against all other persons. *Perley v. Chandler*, 6 Mass. 454. *Stackpole v. Haley*, 16 Ib. 33. *Jackson v. Hathaway*, 15 Johns. 447.

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Under our more recent statutes the law now is in this state, as it ever has been in England, and other of the American states, that the owner of land is under no obligation to fence his own land along a highway. The obligation in this respect results only from his duty to restrain his own cattle from trespassing upon his neighbor. He may leave open his own land to the highway, and his cattle may enjoy the full range of the margin in devouring the herbage or in other pastimes, without trespassing upon anybody, and without giving any individual of the public any ground of complaint, unless he is guilty of some fault through which the enjoyment of the public easement is impaired.

It must be equally his right to let his cattle or horses be in the highway along through his land in case the same should be enclosed by side fences, subject to the same condition in favor of the easement to be enjoyed by the public. *Avery v. Maxwell*, 4 N. H. 36. It follows then, as matter of course, that the mere fact of a domestic animal, as a cow or a horse, being in the highway in this manner cannot be regarded as unlawful—a breach of duty—rendering the owner liable for all injurious consequences that may accidentally flow therefrom. Something more must exist in concurrence with that fact in order to predicate fault in the owner that will render him thus liable. If the animal have the character and habit of peaceableness and quietude it is impossible to say that there would be any breach of duty, at suitable times—as in the open day, and in the ordinary course of the use of highways in farming neighborhoods, to permit either by design or by accident, such animal to be loose in the highway within the limits of his own farm. There may be times and occasions when it would be a culpable fault so to do, and would subject the owner to such damage as might result therefrom. For instance, to permit animals to occupy the highway by night, with the likelihood of their lying down for their rest in the travel path, and by thus obstructing it, causing accident and damage. But in such cases, the question of fault would have to be submitted to the jury upon all the circumstances under proper instructions, as to the respective relative rights and duties of the landowner, and the public.

As before remarked, the only fault charged upon the defend-

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ant as subjecting him to liability in this case, is the fact that he negligently and carelessly failed to restrain his horse from being in the highway; all the rest is charged to the conduct of the horse itself, so being in the highway.

It is obvious that both must concur, in order, upon the plaintiff's own theory, to subject the defendant to the liability claimed.

If therefore, in the eye of the law, fault in the defendant cannot be predicated upon the mere fact of his horse being in the highway, it is obvious that there remains no sufficient ground for charging him with liability for the resulting damage. To hold the defendant thus liable upon the view in which the declaration was framed, and the case was tried, would seem to result in making him the absolute insurer against all casualties that should occur to travelers in consequence of his cattle or horses being in the highway for any other purpose or reason than merely that of using such highway as a thoroughfare.

Now we do not understand the law of the subject to visit such a responsibility upon the defendant. The right of the public to the enjoyment of the easement is unquestioned. The right of the land-owner to any use of the margin of the highway in any manner not inconsistent with that right of the public, is equally unquestioned. The mere fact of a horse or cow being in the highway, and upon the margin depasturing or standing, is, in itself, in no way inconsistent with the right of the public. Whether there by accident or design can make no difference in this respect. In order to constitute the being there of such animal wrongful on the part of the owner, it should appear that the circumstances and occasion, or that the character and habits of the animal were such as to show carelessness on the part of such owner in reference to the convenience and safety of travelers on such highway; and only in this way do we think he should be subjected to liability for accidental injury and damage that may ensue in such a case.

Much is said in the books and cases about its being unlawful to permit cattle to run at large in the public highways; but on examination, it will be found that such unlawfulness is asserted in reference to the rights of adjoining land-owners, who may claim entire immunity from the cattle of others even without any

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fence against them along the highway. We do not at present, as it is not necessary, undertake to say whether in this country persons may or may not let their cattle run at large and depasture along the margin of the road through another's land. There has been a period when in this state no remedy could be asserted by suit for such an act; and it has sometimes been intimated that it was a kind of local common law, that cattle might thus depasture.

This however, was when our statute required land-owners to maintain lawful fences on highways in order to entitle them to impound cattle that had passed from the highway on to their land. That statute not now being in existence, it may admit of question whether we should not now regard ourselves as standing on the English common law on this subject. But it is needless to discuss the subject in this direction.

The judgment is reversed and cause remanded.

HARVEY BURTON v. THE INHABITANTS OF NORWICH.

Attorneys. Power of Selectmen and Overseers of the Poor to employ Counsel. Town Agent. Town Grand Jurors.

It is within the scope of the implied powers of selectmen, to protect the interests of the town, by employing counsel in road cases, when the town agent employs none, and makes no objection to the employment by the selectmen; and the assent of the town agent will be presumed where no dissent is shown.

Whether, in case of disagreement, the selectmen, or town agent, would have the paramount right in respect to the employment of counsel in road cases, *quere*:

Before the law was enacted creating the office, it was not the intent of the legislature, by the creation of the office of town agent, to deprive overseers of the poor of the authority to employ counsel for the town in matters within the scope of the duties of their office.

In the administration of that portion of criminal justice, entrusted to towns, and in which the fine and costs collected go to the town, and which is conducted

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at the expense of the town, the necessity for legal advice and assistance in many cases, is obvious, and the authority to employ counsel in such cases is lodged in the town grand juror, and not in the town agent.

It never was intended that town agents should take charge of criminal prosecution; the statute creating his office and defining his duties, having reference only to civil suits; and his duties obviously pertain to pending litigation, and to the commencement of suits resolved upon, rather than to preliminary advice.

BOOK ACCOUNT. The facts reported by the auditor, so far as they are necessary to illustrate the decision, are sufficiently stated in the opinion. Trial by the court, at the December Term, 1860,—REDFIELD, Ch. J., presiding. The court rendered judgment upon the report for the plaintiff, deducting all charges for services, which were rendered by the plaintiff in the employment of, or in consultation with, the town grand juror of Norwich, to which decision the defendants excepted.

Harvey Burton and Converse & French, for the plaintiff.

Washburn & Marsh, for the defendants.

PECK J. This is an action on book, and comes to this court on exceptions to the decision of the county court, in allowing certain items of the plaintiff's account objected to by the defendant.

The report shows that the plaintiff, at the time the account accrued, was an attorney and counsellor at law, residing in the town of Norwich.

Among the items so objected to by the defendant, and allowed by the county court, are items No. 1, 4, and 15, for professional services as such attorney. No question is made, but that the plaintiff rendered the services, but it appears from the report, that at the time they were rendered, the plaintiff was one of the selectmen of the town, and it is claimed by the defendant that the plaintiff rendered the services in his capacity as selectman, and not as an attorney, and that he never was employed by the town as an attorney or counsel, in the suits or matters in which the services were rendered. If this is so, the judgment of the county court was wrong in allowing the amount charged, which is more

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than he would be entitled to if he rendered the services as selectman merely, and not in his professional character—for the report shows, “that the selectmen of the town received but one dollar per day for their services, by vote of the town, for some four or five years, including the year in which the plaintiff was selectman, and that this vote and custom were known to the plaintiff.” This binds the plaintiff to that vote of compensation for all services rendered for the town in his official capacity as selectman. These three items accrued under the following circumstances: A petition was pending in court, in which the town was a party, and in which a hearing was about to be had before commissioners, relative to laying out a highway, and “a notice was served upon the plaintiff, as selectman, of the time and place of hearing. He thereupon informed the other selectmen, and had a consultation with them about the matter. The plaintiff advised to the employment of counsel, and said that such was the state of his health that he did not want to take the responsibility of the business upon his hands. With the understanding of the other selectmen, he wrote to Washburn & Marsh to attend before the commissioners as attorneys for the town, and he received a letter from them containing suggestions in regard to the preparation of the case. In accordance with the suggestions, the preparation was made, and that is the service charged for in item fifteen of the account.” This item, as appears by the account, is for “*examining town records and reports, getting copies of taxes, and preparing the West Hartford road case for hearing before commissioners.*” The other two items are for attending before said commissioners as attorney or counsel three days, Mr. Marsh having also attended the hearing as counsel for the town. It is objected that the selectmen have no authority to employ counsel, and thereby charge the town, and it is insisted that the sole authority to employ counsel is invested in the town agent.

The statute provides that “the selectmen shall have the general supervision of the concerns of the town, and shall cause all duties required by law of towns and not committed to the care of any particular officer, to be duly performed and executed,”—and entrusts the subject of highways specially to the selectmen. Comp. Stat. p. 118, sec. 43. It also provides among the officers to be

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elected annually, by towns, that they shall elect "*an agent to prosecute and defend suits in which the town is interested.*" and while it prescribes the duties of other town officers, it leaves the duties of the town agent to be inferred from the name and designation of his office, in the provisions relating to his appointment above stated.

Considering the general duties imposed on the selectmen in connection with the special duties imposed on them in relation to highways, the court think that it is within the scope of their implied powers to protect the interests of the town by employing counsel in road cases, where, as in the present case, the town agent provides no counsel and makes no objection to the employment of counsel by the selectmen. It is true that in *Follett v. Whittingham*, in Windsor County, 1860, the supreme court decided that when a suit was pending, it was primarily the business of the town agent to employ counsel in such cases, but they also decided that a retainer of counsel by the selectmen with the knowledge and without any dissent on the part of the agent, he declining to act in the matter, was binding until the counsel was subsequently dismissed by the town agent, subsequently elected, who employed other counsel, and that the attorney could not recover for services rendered after such dismissal—but they did not decide what the effect would have been if the employment had been without notice to the agent. We think his assent may be presumed if that is necessary, where, as in this case, he neglects to employ counsel and no dissent is shown. Which would have the paramount right, in case of disagreement, it is not necessary to decide.

But it is objected that there was no employment of the plaintiff by the selectmen, and that the plaintiff being one of the selectmen, an express employment by the other two, (it appears there were three,) must be shown. There must be an employment either express or implied. But if one selectman is an attorney, and performs necessary professional services for the town in a matter in which the other selectmen, or either of them, act without any dissent on their part, the assent of the others will be presumed, and it is equivalent to an express employment.

But in this case so far as these three items are concerned, inasmuch as other counsel were employed, it cannot be inferred that

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it was the mutual understanding and expectation of the plaintiff and the other selectmen, or either of them, that the plaintiff was acting as counsel in his professional capacity, but the contrary; these services must therefore be referred to the plaintiff's official capacity as selectman, and be subject to the rule of compensation applicable to such services. The assistance rendered by the plaintiff in that proceeding, was mainly such as might have been rendered by him had he not been a lawyer; it is true it appears he sat with Mr. Marsh, the counsel of the town, and asked some questions, but that is not enough to give a professional character to the services, in the face of the other facts reported.

Item number six was for attending on a trial before commissioners in another case, relating to laying a road, in which the town was a party, and differs from the items already considered in this, that he attended in connection with one of the other selectmen, and the town had no other counsel, and nothing was said to show in what capacity he should act, or to rebut the presumption of an understanding that he was to be paid for his services according to their character, that is, in his professional capacity—and for this item he should be allowed as he has charged.

Item 23, the auditor reports, was for services rendered at the request of the overseer of the poor, and on reference to the account, it is said to be for "advice relative to Mr. Field being a town pauper, and going to his house, at request of overseer of poor." To this item it is objected that the overseer has no authority to bind the town by the employment of counsel. It is certainly necessary and important for the interests of the town, that the overseer should, in many instances, in his department, have legal advice to guide him—difficult questions often arise in relation to the settlement of paupers, and it often becomes necessary for the overseer to determine whether to procure an order of removal, and for that purpose to know in what town the pauper has his legal settlement, in order to know whether to make a removal, and if so, to what town. The overseer is often called on to judge whether to appeal from an order made against his town. The consequence of making a wrongful removal, or of removing one to a wrong town, or of taking an appeal under a

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mistaken idea of the law, at once involves the town in litigation, and in no part of the business of a town is reasonable legal advice more necessary than in relation to paupers.

But it is claimed that the town agent has the exclusive authority to engage counsel and take advice. But it seems most appropriate that it should be left to the officer who has the charge of this branch of the business of the town, and who, from his superior knowledge of the facts, would be better prepared to so lay the case before the counsel, as to obtain correct advice, and who is called on to act upon such advice. Before the law was passed creating the office of town agent, there can be no doubt that the overseer had such authority. The law creating the office of town agent, is of comparatively recent origin, and there is no good reason to suppose that by the creation of that office the legislature intended to take away this necessary and salutary power, and transfer it to the town agent. The town agent is designated, in the statute as "an agent to prosecute and defend suits in which the town is interested," and his duties obviously pertain to pending litigation, perhaps to the commencement of suits resolved upon, rather than to preliminary advice, the object and effect of which often is to prevent litigation. This item being of this character must be allowed.

As the defendant has succeeded on his exceptions, in reversing the judgment, it becomes the duty of the court to render such judgment as the county court ought to have rendered, and to correct errors, if any, that may be found in the judgment below by the disallowance of items that the plaintiff claimed, although the plaintiff did not except.

The court below rejected items No. 13, 14, 18, 19, 20, 21 and 24, which the auditor finds were rendered at the request of the grand juror. The same objection is made to these items, viz: the want of authority in the grand juror to employ counsel. In the administration of that portion of criminal justice entrusted to towns, and in which the fines and costs collected go to the town, and which is conducted at the expense of the town, the necessity in many cases for legal advice and assistance is obvious, both for the interests of the town and for the welfare of the public generally. It is reasonable that some officer of the town should have

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this authority, and we know of no officer more competent to judge when counsel is necessary for such purpose than the grand juror. It is quite clear that it never was intended that the town agent should take charge of criminal prosecutions. He is appointed to prosecute and defend suits in which the town is interested. This must have reference to civil suits. With regard to criminal proceedings, the town grand juror is a prosecuting officer, and complaints are to be filed in his name, and prosecuted under his oath of office, and he, and he alone, is to exercise his judgment as to what cases to prosecute, and in what cases to enter a *nolle prosequi* if justice to the accused or the interest of the public requires it. This power he had before the creation of the office of town agent, and there is no reason to suppose that this important duty was intended to be taken from him, and transferred to the town agent. If such had been the intention, it would have been so provided. Most of these items appear on their face to have accrued in cases within the exclusive jurisdiction of a justice of the peace, and as to the others, in the absence of anything to warrant a contrary inference, they may be presumed to be of the same character, and be taken to be such as the grand juror had a right to incur at the charge of the town. Had it appeared that they accrued in cases beyond the jurisdiction of a justice to hear and finally decide, and therefore not prosecuted at the expense of the town, they could not be allowed, as compensation in such cases is made by the state under an allowance by the court auditor.

The conclusion is, that the judgment of the county court is reversed, and items Nos. 1, 4, and 15, amounting to \$103, allowed by the county court, be disallowed, and items Nos. 13, 14, 18, 19, 20, 21 and 24, amounting to \$13, disallowed by the county court, be allowed. And in place of items Nos. 1, 4, and 15, there is to be allowed to the plaintiff the sum of four dollars, for four days services as selectman, being at the rate established by vote of the town. As to the residue of the account, the judgment is in accordance with the judgment of the county court.

BARRETT, J., did not concur as to the grand juror's right to employ counsel and bind the town.

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JAY WILSON v. ALBERT G. MARSH, ALONZO B. BIRD AND
SAMUEL H. HIBBARD.

Duties and Liabilities of Listers.

While in relation to most of the duties of listers, they involve so much of matter of judgment and discretion, and partake so much of the nature and character of judicial proceedings, that their judgment, exercised in good faith, and without malice, is conclusive in their favor, yet in relation to setting real estate in the list to the owners or the persons liable to pay taxes thereon, so far as relates to the persons to whom the land is to be set and the number of acres, the listers are bound to act in good faith, and with common care, skill and prudence, and if they so act they are not liable for mistakes or inaccuracies; but if not, they are liable to the party injured for the consequences of such mistakes, oversights or inaccuracies.

The statute requiring the listers to make an appraisal of real estate once in five years, was obviously intended to give a degree of permanency to the list for that period, with such intermediate changes as the changes of ownership or occupancy, or the erection or destruction of buildings may require, and the listers between the years of such appraisal have a right to rely on it as correctly made up, and to make it the basis of a new list, and they cannot be charged with negligence for not discovering and correcting errors arising from events subsequent to the making of such list, unless they are of such an extent and character and so obvious as to be equivalent to notice.

CASE.—The declaration set forth that the defendants were listers of the town of Bethel for the year 1857, and that as such listers they illegally set certain parcels of land to the plaintiff as the owner or possessor, and thereby compelled him to pay taxes thereon. Plea, not guilty, and trial by jury, at the December term, 1860, BARRATT J., presiding.

The plaintiff claimed to recover of the defendants for taxes paid by him as an inhabitant of the town of Bethel upon the list of 1857, upon the following pieces of real estate which were set in the list of that year by the defendants as listers of said town, as follows:

- 1—Hiram Wilson land, 12 acres, appraised at \$226.
- 2—Ellison land, 6 acres, appraised at \$339.
- 3—Saw mill, appraised at \$222.
- 4—Washburn shed, appraised at \$56.
- 5—Sanders place, 150 acres, appraised at \$2,825.
- 6—Lillie place, 260 acres, appraised at \$3,164.
- 7—Backbone, 100 acres, appraised at \$170.

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The plaintiff gave in evidence a deed from himself to Orville Bowen, dated January 14, 1850, and recorded the same day, of the twelve acre piece numbered one, and proved that he had had no occupancy, and nothing to do with said land since the making of the conveyance thereof.

It appeared from the evidence that when the listers in 1855 were about making the appraisal of that year, and for the purpose of ascertaining what land should be set in the list and appraised to the plaintiff, one of the then listers, George S. Hatch, examined the town records, and not being able therefrom to get satisfactory information, inquired of the plaintiff, Hatch also having some personal knowledge of the plaintiff's real estate in Bethel. With what the records showed, what Hatch knew, and what was elicited by inquiry, the listers were enabled to make a list of the plaintiff's property, which was satisfactory, the listers supposing that no parcel of property was set in the list that was not directed so to be set by the plaintiff. The listers duly deposited their list of appraisals in the town clerk's office, as required by law, in which was contained this parcel No. 1, "Hiram Wilson land, 12 acres."

The plaintiff also gave in evidence a deed from himself to George Gilson, dated May 9th, 1856, which was recorded the same day, of the six acre piece, numbered 2, and proved that he had had no interest in, or occupancy of, it since the making of the conveyance thereof. In reference to this parcel the defendants proved and the plaintiffs conceded, that it was entered upon the list of appraisals of 1855 by the listers, by the same descriptive name, "Ellison land, 6 acres," by the direction of the plaintiff, when called upon by Hatch as above stated, in respect to parcel No. 1. It was also proved that the deed introduced by the plaintiff from himself to George Gilson, gave no description of the land thereby conveyed, except by referring for a description to another deed, therein described as having been executed by William and Jane Meserve to the plaintiff, and dated February 8, 1855; and that no such deed, as that last mentioned, could be found upon the records of the town clerk's office; but there was such a deed on record dated February 8, 1854; that the said six acres were part of a farm of about ninety-eight acres, formerly

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owned by Nelson Ellison ; that Ellison, April 1, 1853, sold to William Meserve all of said farm except forty acres ; that Meserve afterwards conveyed to the plaintiff the land thus bought by him of Ellison ; that the plaintiff afterwards sold all of the same land, except the meadow, to George Gilson ; that afterwards, by another deed, he sold to Gilson eight acres off the lower end of the meadow, which left the six acres above mentioned, which the plaintiff claimed were conveyed by the deed of May 9, 1856, above mentioned ; that the grantee, Gilson, upon the last named conveyance, went into immediate possession, and by himself and his grantees had been in possession ever since.

The plaintiff also gave in evidence a decree of the court of chancery of Windsor county, in favor of Job Sanders, against himself, for the foreclosure of a mortgage of the saw mill, numbered three, under which the equity of redemption expired April 1, 1856, and also gave in evidence a deed of said Sanders to James J. Wilson, dated April 3, 1856, recorded the same day, conveying said saw mill premises covered by said decree, and proved that the Washburn shed, numbered four, was situated near to the saw mill, in front of and separated from it by a side road ; that the shed was built for the use and convenience of the saw mill, and had always been used for that purpose, and that he always regarded the same as parcel of the saw mill premises, and as embraced in said mortgage and decree, and in the deed of Sanders to J. J. Wilson, and that he had had no interest in, or possession or occupancy of the saw mill, or shed, since the expiration of the equity of redemption.

Upon the construction of this deed in connection with the facts, the court held that the shed was embraced in the mortgage, and passed under the decree ; to which decision the defendants excepted.

The defendants proved that the plaintiff, in giving in his list for appraisal in 1855, which was the year of the appraisal of real estate by the listers, gave in the saw mill and the shed separately, and as distinct parcels, and they were set in the list as thus given in.

The plaintiff also gave in evidence a mortgage deed from himself to Leonard R. Sanders, dated August 9, 1855, which cov-

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ered piece numbered five, and which was on the 9th day of August, 1855, assigned to Job Sanders. Said mortgage deed bore date August 9, 1855, and was given for the purchase money, the same farm having been sold and conveyed by Leonard R. Sanders to the plaintiff the same day; and at the time of the transfer Job Sanders held a mortgage for \$2,000 on the same place, given him by L. R. Sanders before said conveyance to the plaintiff, upon which there was interest due in 1856, which has remained due ever since.

And the plaintiff also gave in evidence a petition entered in the court of chancery of Windsor county, at the December term, 1855, in favor of Job Sanders against Jay Wilson, for the foreclosure of said mortgage, upon which petition a final decree was made by the court at its May term, 1860, which was pending by appeal in the supreme court at the time of this trial.

It was proved that the plaintiff, at the time he took the conveyance of said premises, leased them to said L. R. Sanders till April 1, 1856; that the lease was assigned to Job Sanders, who, in October, 1855, went into possession of the premises under the lease; that Job Sanders had continued in the possession and occupancy of them ever since; that there was something due and unpaid on the mortgage on said premises when Sanders went into possession thereof, in breach of the condition of said mortgage, and that something had remained due and unpaid upon said mortgage and in breach of the condition thereof, ever since.

It appeared that the parcel numbered five was entered upon the list of 1856 by the listers of that year, as the property of the plaintiff; and it did not appear that the defendants, at the time of making the list of 1857, had any knowledge in fact of the mortgage to Sanders, or of the pendency of the petition for foreclosure, or that Job Sanders was, or claimed to be, in possession under said mortgage. It appeared that at the time of making the list of 1857, Sanders did not live upon the farm, but resided upon an adjoining farm, about eighty rods from said Sanders' place.

The plaintiff also proved that on the 17th day of September, 1853, he purchased and took conveyance of the Lillie place, numbered six, and on the same day gave a mortgage thereof to George S. Hatch to secure the payment of \$2,000 in eight years,

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with interest annually, and a subsequent mortgage to Simon Brockway to secure the payment of \$700, in ten years, with interest annually; that on the occasion of executing the last named mortgage, he executed to Brockway a lease of the premises for the term of seven years, conditioned that if the plaintiff should pay the interest to Hatch on the \$2,000 annually, and all costs that should be incurred in consequence of neglecting so to do, then said lease should be void; and providing that if the plaintiff should pay the interest to Hatch as aforesaid, then he should have the full possession of the demised premises and the profits thereof, for such years as he should pay the interest, but if he should fail to pay the interest and costs as aforesaid any one year, then for such year Brockway should have the possession of the premises under the lease.

It was also proved that in March, 1856, Brockway sold and assigned to William and Walter Rogers said note and mortgage, and also the lease; that they, on the 12th day of July, 1856, took possession of said premises under the lease, in consequence of the failure of Wilson to pay the interest to Hatch as aforesaid; that they continued to hold such possession under said lease till the last day of March, 1859, at which time the plaintiff having paid the interest to Hatch which was due at that time, resumed possession of the premises; and that at the time Rogers took possession interest was due and unpaid on the Brockway mortgage, in breach of the condition thereof, and also on the mortgage to Hatch, and so continued to be due during all the time they held possession.

The defendants proved, that the plaintiff, in giving in his list of parcels of real estate, in 1855, gave in parcel No. 6, by the descriptive name of the "Charles Lillie place, 260 acres," and that it was accordingly so entered by the listers upon the list of appraisals of that year. It did not appear that the defendants, at the time of making the list of 1857, had any knowledge in fact of the mortgage to Hatch, or of the mortgage to Brockway, or of the possession of the premises by the two Rogers, though their possession was open, notorious and exclusive.

As to No. 7, the plaintiff proved that, some time prior to the year 1855, he purchased and took conveyance from George Bar-

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rett. of a portion of what was known as the Bryant Brown farm, which parcel thus conveyed, was in the deed described, and said to "*contain one hundred acres more or less*;" that in fact it contained only about sixty acres; that that parcel was all the plaintiff ever owned of said Brown farm; that the defendants set in the list of 1857 to the plaintiff, a parcel of said Brown farm as follows: "Barrett lot, fifty acres, appraised at one hundred and thirteen dollars;" and also set in said list of 1857 to the plaintiff, parcel of said Brown farm, as follows: "Back Bone, one hundred acres, appraised at one hundred and seventy dollars." It appeared that, in the enquiry made of the plaintiff by Hatch, as stated above in respect to parcel No. 1, from what passed between the plaintiff and Hatch on that occasion, in connection with what Hatch had found on the records, and his own knowledge as to the plaintiff's real estate, Hatch understood that two parcels of the Bryant Brown farm were to be set to the plaintiff, one by the designation of the "Barrett lot," the other by the designation of the "Back Bone," and accordingly they were so set, in good faith, in the list of appraisals; but in so doing, Hatch was in error, in supposing that said terms of designation indicated, and applied to, distinct parcels, the appellation being in fact used indiscriminately to designate the same single parcel, and not two distinct parcels.

The plaintiff proved that on all the aforesaid parcels of real estate, thus set in the list of 1857, there was assessed against him the town tax for said year of forty cents on the dollar, highway tax of eighteen cents on the dollar, state tax of sixteen cents on the dollar, and state school tax of eight cents on the dollar, and that therefor tax bills were duly made out and placed in the hands of the collector of said town of Bethel for said year, and the same were collected by and paid to said collector in due course by the plaintiff. It was also proved that the plaintiff paid the taxes without objection or protest.

It was also proved that all of the parcels, except the Sanders place, were set in the list of appraisal of 1855, in the same manner and with the same appraisal as in the list of 1857.

There was no record of any of the aforesaid decrees in the town records of Bethel in April, 1857, and the town clerk fur-

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nished to the listers, April 1, 1857, a certificate, purporting to be a list of all transfers of real estate appearing of record in his office to have been made between the first day of April, 1856, and the first day of April, 1857,—which was produced and given in evidence,—in which none of the aforesaid pieces of real estate were embraced, and all transfers so noted were entered upon the list by the defendants.

The defendants, as listers, did not examine the records of the town to ascertain in whom was the title to any real estate in town; nor did they make any inquiry of the occupants whom they found in possession, when taking the list, as to the owner of any of the real estate in said town.

It was also proved, that the plaintiff did not give any notice to the listers in relation to any of said pieces of real estate, that he was not the owner or possessor.

There was no evidence or claim, that the defendants, as such listers, acted in any bad faith in thus setting said real estate in the list of 1857 to the plaintiff, or were wanting in ordinary care or prudence, except so far as it may have been their duty as listers to resort to and act upon information other than that furnished by the list of appraisals of 1855, and the certificate of transfers, in ascertaining to whom the parcels of real estate should by them be set in the list of 1857.

Upon the evidence and facts thus detailed, the court *pro forma*, ruled that the defendants were liable to the plaintiff for the taxes paid by him upon the aforesaid parcels of real estate, and directed the jury to return a verdict accordingly,—which they did for the sum of sixty-two dollars and three cents, to which the defendants excepted.

James J. Wilson and Convers & French, for the plaintiff.

Philander Perrin and Washburn & Marsh, for the defendants.

PECK, J. The plaintiff claims to recover of the defendants in an action on the case, upon the ground that as listers in the town of Bethel, for the year 1857, the defendants wrongfully set to the plaintiff in his list certain parcels of land for which he was

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not liable to be listed, whereby he was wrongfully subjected to taxation on the same.

He proves that the defendants set the parcels of land in his list for that year upon which taxes were assessed against, and paid by him. The court upon these facts and other facts set forth in the bill of exceptions, *pro forma*, directed a verdict for the plaintiff, and the question is, whether *as matter of law*, the defendants upon the facts set forth are liable. This suit involves the question whether the listers in this case committed any errors for which they are liable *as matter of law*, or for which under the rule of law that governs such cases, the jury would be warranted in finding a verdict against them. Both questions may properly be considered, although, strictly, the first question only is necessary to the determination of the question whether, upon this bill of exceptions the judgment ought to be affirmed or reversed.

We need spend no time in disposing of the question, as to the rule of law that governs the liability of listers; for while in relation to some of their duties they involve so much of matter of judgment and discretion, and partake so much of the nature and character of judicial proceedings that their judgment exercised in good faith, without malice, is conclusive in their favor; yet in relation to setting real estate in the list to the owner or persons liable to pay taxes thereon, so far as it relates to the persons to whom it is to be set and the number of acres, it may be regarded as settled that the listers are bound to act in good faith and with common care, skill and prudence, and that if they so act, they are not liable for mistakes or inaccuracies, and if not, that they are liable to the party injured for the consequences of such mistakes, oversights, or inaccuracies.

This was so decided in *Stearns v. Miller et al.*, 25 Vt. 20. It is true in that case, (the error consisting in too great a number of acres being set in the list,) the injury complained of arose from an error committed by the listers, the defendants in the action, the year of appraisal when it was their duty to designate the quantity or number of acres, the value, and the owner or person liable to be listed therefor. And it appeared in that case also, that the plaintiff furnished to the listers a statement of

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his real estate, containing the number of acres and the listers for some cause set to him a greater number of acres than such statement contained, and more than he actually owned or was liable to have set in his list. But this cannot vary the rule of law, but leaves its application to be made to a different state of facts. But notwithstanding this decision, the question is still left open, what is common care, skill and prudence in each particular case. This is sometimes, upon a given state of facts not in dispute, a question of law; and sometimes a question to be submitted to the jury for them to find under instructions.

In the case at bar, it is stated that "there was no evidence or claim that the defendants as such listers, acted in bad faith in thus setting said real estate in the list of 1857, to the plaintiff, or were wanting in ordinary care or prudence, except so far as it was their duty as listers to have resorted to and acted upon information other than that furnished by the list of appraisals of 1855, and the said certificate of transfers, in ascertaining to whom the said parcels of real estate should by them be set in said list of 1857." It further appears by the case that the town clerk furnished to the listers April 1, 1857, a certificate purporting to be a list of all transfers of real estate appearing of record in his office to have been made between April 1, 1856, and April 1, 1857, and that the defendants duly noticed in making the list all transfers appearing by such certificate to have been made, and it must be taken that the defendants in other respects followed the appraisal of 1855. The only question is, were the defendants bound to look beyond the appraisal of 1855 and the certificate of the town clerk, as this is the only particular in which, the plaintiff claimed the defendants were derelict in their duty there being no claim that the defendants had any knowledge of any errors when they made the list, either in the list they made or in that of 1855, or in the certificate of the town clerk.

As to one class of grievances complained of by the plaintiff, it appears they were errors or alleged errors in the list or appraisal of 1855, and were continued and carried into the list made by the defendants in 1857. As to these the court think the defendants are not responsible. The law requires the listers to make an appraisal once in five years, and on such appraisal the

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listers are required to make a list thereof, and set the number of acres, the amount of the appraisal and the *per centum to such owners thereof as are by law liable to pay taxes thereon*. It then provides that in case of transfers of title in the intermediate time between such appraisals, the listers for such intermediate years shall make corresponding changes in the list. This list of real estate is obviously intended to have a degree of permanency for five years, with such intermediate changes as the change of ownership or occupancy, or the erection or destruction of buildings (which is specially provided for,) may require, and the listers between the years of appraisal have a right to rely on it as correctly made up, and make it the basis of a new list, and if they do so, and are guilty of no fault in making, or omitting to make, such changes as the statute contemplates, arising from subsequent events, they cannot be held liable for errors in such appraisal of which they are ignorant, nor charged with negligence for not discovering and correcting such errors, unless it appears that they are not only such as they have the power to correct, but that they are to such an extent and of such a character, and so obvious as to be equivalent to notice. It is true the statute, sec. 8 of the act of 1855, makes it the duty of the listers each year to set real estate to the owners or occupants, such person as shall be the owner or possessor thereof on the first day of April in each year, but the two statutes must be construed together. We have already seen that listers are not bound at their peril to a literal compliance; it is a question of care and diligence.

Another grievance complained of is, that the defendants set in the plaintiff's list real estate that he had sold and transferred by deed on record subsequent to the appraisal of 1855, and before April 1, 1857, and which he did not occupy. This transfer, it appears, was not upon the certificate of transfers furnished to the defendants by the town clerk; and the question is, (to use the language of the exceptions,) were the defendants "wanting in ordinary care and prudence," in not resorting to and acting upon information other than that furnished by the certificate of transfers.

The statute requires the town clerk for the use and benefit of the listers, to prepare and keep a list of all the transfers of real

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estate, particularly mentioning in such list the names of the grantor and grantee, the number of acres included in each transfer, etc.

We are not prepared to say that this statute was intended in all cases to be a substitute for the duties required of listers in relation to ascertaining what transfers have been made so as to absolve the listers in all cases from further enquiry, and yet the force we give to it may in many cases have that effect. There may be cases where from a change of occupancy known to the listers together with other circumstances tending to show a change of title, or where the listers are possessed of such other facts as ought to put them on inquiry outside the certificate, it would be their duty to do so. But the town clerk is a public officer required by law to perform this duty, "*for the use and benefit,*" and at least, in aid of the listers: he is the person from his situation, who has the best means of knowledge, especially, as he has this duty before him during the year to keep this list: and can it be regarded as culpable negligence in the listers to rely on his doings in this particular where no facts come to their knowledge to lead them to doubt his accuracy. This certificate would be but little if any aid to the listers, if they are bound at their peril to examine the records, and not only test its accuracy as to what it does show, but also to see that there are no other transfers. When a party is charged with negligence in not knowing a fact, it is competent for him to show that he made inquiry of persons liable to know, and sought information from the proper source. Here the defendants have made such inquiry of a public officer who is not only most likely to know, but whose duty it is to collect, preserve, and furnish the information; and the court are of opinion that there is nothing in this case which so far puts them on inquiry as to make them liable for acting on the information they received from the clerk through the certificate.

Another complaint is that some of the parcels set in the list of 1857 to the plaintiff, were under mortgage from the plaintiff, and that prior to the first day of April, 1857, the mortgagees had taken possession for condition broken, and were in the occupancy under their mortgages when that list was made, and that such

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parcels ought not to have been set to the plaintiff, but to such mortgagees. The statute provides that real estate shall be set to the owner or occupant, and that the mortgagor shall be deemed the owner until the mortgagee takes possession, *after which he, the mortgagee, shall be deemed the owner*. This is equivalent to saying that the land shall be set to the mortgagee in possession under his mortgage. To have made the list correct the land in possession of the mortgagees under their mortgages should have been set to such mortgagees and not to the plaintiff. But it is claimed that this is no ground of action for the reason that the plaintiff has lost nothing by the error, inasmuch as he would ultimately have had the taxes to pay, when he redeemed, had the mortgagee paid the taxes. It is true that in order to entitle the plaintiff to recover he must show he has sustained some damage. In the case of *Stearns v. Miller*, 25 Vt., above referred to, the defendants ultimately recovered, by showing that the town omitted to collect of the town taxes, assessed on the erroneous list, as much as was equal to the sum by which the whole taxes on that list were increased by reason of the error in the list. And in this case, if the court could assume that the plaintiff would redeem, there would be plausibility in the argument, but this can not be assumed—he may never redeem, and if he should not, and the value of the premises, with the rents and profits the mortgagee receives, is equal to the debt and the taxes the mortgagee would have paid had the list been made to the mortgagee, the plaintiff would not have to pay the taxes, either directly or indirectly—to say nothing of the difference between being compelled to pay the taxes immediately to the collector, and paying them ultimately when he redeems.

But the court are of opinion that it was error to hold that as matter of law the defendants were liable for setting these parcels in the list to the mortgagor, inasmuch as the case shows that the listers had no notice of any change of possession from the mortgagor to the mortgagee. Nor can the court say as matter of law there was no want of care, or diligence. The determination of this question depends on such a variety of facts and circumstances and inferences to be drawn from the evidence, that it should be left to the jury as a question of care and diligence. The same rule applies as to the parcel foreclosed, and which

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passed into the possession of the mortgagee under the foreclosure. That transfer is not matter of record in the town clerk's office, and the defendants can not be affected with constructive notice of the proceedings in court and decree of foreclosure. It is true the mortgage may be of record, but that is not such a transfer as requires any change in the list, it is only the taking possession under it, or a final foreclosure, that gives the right to set it in the list of the mortgagee.

As to the Lillie place, (No. 6,) Rogers must be regarded as in possession under the lease from the plaintiff, so far as these defendants are concerned. The case states the possession to be under the lease and when the condition in the lease happened by which the plaintiff was to have the possession, the possession was surrendered up to the plaintiff, although the mortgage held by the lessee (Brockway,) or Rogers his assignee, was still due. And although this happened after this list was made, yet as the plaintiff was a party to it, it is evidence as to the character of the possession in 1857. At any rate, whatever may have been the character of the possession, whether under the lease or under the mortgage, it was so equivocal in its character that the defendants are not liable for not setting this parcel to the mortgagee by reason of this possession—it could not be regarded as negligence to set it in the plaintiff's list, notwithstanding such possession was thus equivocal.

It would seem to be more reasonable for the statute to make it the duty of tax payers to present to the listers a list of their real estate, as well as of their personal property, and to give notice to the listers of all transfers by them of real estate during the preceeding year, and for mortgagors to give notice when the mortgagee takes possession, as the facts are more peculiarly within their knowledge than to hold that the listers are to take notice of such facts at their peril. But the statute has not so provided, and the court do not feel justified in imposing such duty in the absence of any such enactment, especially as the statute requires them to give a list of personal estate, and is silent in this respect as to real estate. The case therefore must be submitted to the jury under the general principles above expressed, so far as the facts developed on a new trial may make them applicable.

Judgment reversed and new trial granted.

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DANIEL TOWN v. JONAS G. LAMPHERE.

*Recovery of Penalty under Statute relative to restraint of Rams.
Construction. Former Adjudication.*

The forfeitures provided for in sections four and six of chapter ninety-six of the Compiled Statutes, and in the act of 1856 in amendment thereof, are distinct and independent forfeitures, and both may be enforced by the same party.

The decision in the case of *Hall v. Adams*, 2 Aik. 130, considered and approved.

A verdict and judgment is conclusive evidence, between the same parties in a subsequent suit, of whatever it was necessary for the jury to have found in order to warrant [the verdict in the former action, and no further.

This was an action founded upon the act of the legislature, entitled "an act in alteration of chapter ninety-six of the Compiled Statutes, relating to the preservation of sheep," approved November 12, 1856, and was brought to recover the penalty therein provided for suffering rams to be at large off the enclosure of the owner, and came into the county court by appeal from the judgment of a justice. Plea, the general issue, and notice of special matter.

Trial by the court, at the May term, A. D. 1861, REDFIELD, Ch. J., presiding.

From the statement of facts agreed upon by the parties, it appeared that the plaintiff, on the 21st day of September, 1857, commenced this action against the defendant before a justice of the peace, counting on the first section of "an act in alteration of chapter ninety-six of the Compiled Statutes," approved November 12, 1856, in which action the plaintiff recovered judgment for the penalty provided in said section, and for his costs, from which judgment the defendant took an appeal to this court at the December term, 1857; that previous to the commencement thereof, the defendant therein had taken away from the possession of the plaintiff the ram, which, it is alleged in this action "was found with the sheep of the plaintiff and off the enclosure of the defendant," and for which alleged finding of the ram this action was brought; that the ram, at the time it was so found was marked with the defendant's initials, and was at the time of going astray in the keeping of Paschal P. Shattuck; that on the first day

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of September, 1859, the plaintiff commenced an action of trover before a justice of the peace, against the defendant for taking the ram as aforesaid, claiming that the ram became his property by forfeiture under the provisions of the statute, and that on the 24th day of September, 1859, he recovered judgment therein for the value of the ram, and for his costs, which the defendant paid and satisfied, the action not being appealable; that that action and this were predicated upon one and the same transaction. It further appeared, that the ram in question, was kept with two other rams belonging to Thomas W. Pitkin, in the pasture of said Paschal P. Shattuck; that the three rams escaped from the pasture together, and were found and taken up together, by the plaintiff; that afterwards, and before the commencement of this action, to wit: on the 5th day of September, 1857, Pitkin settled with the plaintiff for and on account of the three rams being found at large, and paid him five dollars and fifty cents in full satisfaction of all claims for so finding and taking them up. But it also appeared that the above accord and satisfaction were given in evidence by the defendant on the trial of the action of trover, in defence of the same. Upon these facts the county court rendered judgment *pro forma* for the defendant. Exceptions by the plaintiff.

Rodney Lund, for the plaintiff.

Andrew Tracy, for the defendant.

PECK, J. The questions in this case arise under the provisions of chapter ninety-six, Comp. Stat., and the amendments thereto.

Sec. 1 requires that all rams shall be restrained from going at large from August 1st to December 1st.

Sec. 2 makes it the duty of the owner or keeper of a ram, before the first day of August, to put upon it the initials of the name of the owner or keeper.

Sec 3 provides that if any ram is found going at large off the possession or enclosure of its owner or keeper, without such mark, within the aforesaid period, it shall be forfeited and become

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the property of any one who shall take up and secure the same. The act of 1855, however, repeals this section and substitutes a penalty of five dollars.

Sec. 4 provides that if any person takes up any ram so found at large, having such mark, he shall give notice thereof to the owner, and if the owner appears in six days and pays to such person three dollars, the ram shall be restored, otherwise it shall become the property of such person.

Sec. 6 provides that if any ram shall be found with the sheep of any person other than the owner or keeper of such ram, and not in the enclosure of such owner or keeper, between the times above mentioned, the owner or keeper of such sheep may recover of the owner or keeper of such ram, the sum of five dollars, as a penalty for not restraining such ram as aforesaid. This section by the act of 1856 is repealed and re-enacted with the addition of the words "or rams," after the word "ram" wherever it occurs in the 6th section.

This action is for the penalty prescribed by sec. 6, or rather by the act of 1856. It appears that the defendant's ram was marked according to the requirements of the statute, but the plaintiff claims to recover the penalty on the ground that the ram was found with his sheep off the defendant's enclosure within the prohibited period. The defendant relies in defence on a former recovery by the plaintiff against him in an action of trover for the ram, based on an alleged forfeiture of the ram for the same act or neglect for which this action is brought. It appears that after the plaintiff found the ram with his sheep on the occasion in question, the defendant took it from the plaintiff's possession, for which the plaintiff brought his action of trover, and recovered on the ground that the ram was forfeited by being so found at large. It appears that that action was commenced before a justice of the peace, a judgment was recovered by the plaintiff for the value of the ram, and the judgment paid, pending this suit, the action not being appealable. The taking by the defendant, however, for which that action was brought, was before this suit was instituted.

The defendant's counsel insists that that judgment and payment is a bar to this action, claiming that the plaintiff is not

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entitled to the forfeiture of the penalty of five dollars under section 6, or the act of 1856, after having availed himself of the forfeiture of the ram under sec. 4. It is not denied that the case comes clearly within sec. 6, and the act of 1856 providing for the forfeiture of five dollars, but it is claimed that both forfeitures cannot be incurred, and that they cannot at least both be enforced by the same party. But we think by the statute they are independent forfeitures, and that both may be enforced by the same party. The forfeitures are different. One is a forfeiture of the property itself, the other is a forfeiture of a pecuniary penalty. The one is given to any one who shall take up and secure the ram, the other is given only to the owner or keeper of the sheep among which he is found. It is true the neglect or omission of the owner of the ram to restrain him is an element in both forfeitures, but the cause of forfeiture and the act which constitutes it, are not identical in the two cases. In the one case the forfeiture is not complete till the ram is taken up and secured, and notice given to the owner by the person claiming the forfeiture, while in the other case, the ram being found off the owner's inclosure among another's sheep, constitutes the forfeiture without any act to be done on the part of the owner of the sheep, except perhaps to indicate his intention to treat it as forfeited. Where some third person takes up, and enforces the forfeiture of, the ram, it is evident, we think, it was not the intention of the statute that the owner of the sheep among which the ram was found should thereby be deprived of the penalty expressly given to him by the statute; and it is no more burdensome to the defendant to have both forfeitures enforced by the same person than by different persons. The act of 1817 was in substance like the present statutes, and in *Hall v. Adams*, 2 Aik. 130, it was decided that the forfeitures were distinct and independent, and that both might be enforced by the same person. This decision was made in 1827, and when the statutes were revised in 1839 the same provisions were retained, and in 1856 the 6th section was repealed and re-enacted substantially with the slight alteration already stated, but without any amendment affecting this question. After an acquiescence in that construction for so long a period, and under such circumstances,

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we should not incline to depart from that construction unless we felt very clear that it was erroneous. We think it would be doing violence to the language of the statute to hold that the intent of the statute is that the party claiming the forfeiture can take only one of the forfeitures, the forfeiture of the ram, or the penalty, at his election. Had that been the intent it would have been so expressed. The most plausible construction contended for by the defendant's counsel is, that the third and fourth sections apply only to cases where a ram is found at large, but not with another's sheep, and the 6th section and act of 1856 to cases where it is found with another's sheep. But it is difficult to see how this construction helps the defendant in this action. It only shows that the judgment of the justice declaring the ram forfeited was wrong. But showing that that judgment was erroneous is no defence to this action. This construction of the statute would have defeated the other action, but cannot affect this. But we are disposed to adhere to the construction in *Hall v. Adams*, and to hold that the plaintiff may enforce both forfeitures.

It is claimed that as the present statute (sec. 5,) provides that the owner or keeper of a ram shall be liable for all damages sustained by any person in consequence of such going at large, there is not the same reason for holding that the owner of the sheep may enforce both forfeitures, that there was under the act of 1817 which contained no such provision. But it is by no means clear that this provision is necessary in order to give the party injured an action for damages. One who sustains damage by the omission by another of a duty required by statute, can generally maintain an action for such injury, if he is of the class of persons the statute was designed to protect, and the injury is of a character the statute was intended to prevent. But whether this be so or not, this provision does not change the construction in the particular in question.

The only remaining question made by counsel, is, whether the judgment in the action of trover is conclusive in favor of the plaintiff in this suit. A verdict and judgment is conclusive evidence between the same parties in a subsequent suit, of whatever it was necessary for the jury to find in order to warrant

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the verdict in the former action, and no further. The question in the former suit was, whether the defendant's ram was forfeited to the plaintiff. The question in this case is, whether the defendant has incurred the penalty of five dollars. We have already seen that the forfeitures are distinct and independent, depending on different proof. To prove the forfeiture in this case the plaintiff must show that the ram was found *with his sheep*, which was not necessary to be shown in the other suit. It is clear, therefore, that the former judgment is not conclusive in favor of the plaintiff, of facts necessary for him to prove to entitle him to recover in this action. But the defendant in his notice in this case sets up in defence an accord and satisfaction, and the case shows that the same was given in evidence in defence of the action of trover. The plaintiff claims that the former judgment is conclusive against the defendant on this point. The court or jury must have found in the action of trover that there had been no accord and satisfaction of the forfeiture of the ram; but as the forfeiture claimed in this case is a distinct and independent forfeiture, there may have been an accord and satisfaction of this forfeiture, and not of that in question in that suit. It is obvious therefore, that the former judgment is not conclusive against the accord and satisfaction set forth in the defendants notice in this case.

Judgment of the county court reversed and new trial granted.

CASES
ARGUED AND DETERMINED
IN THE
SUPREME COURT
OF THE
STATE OF VERMONT,

FOR THE
COUNTY OF ORANGE,

AT THE
MARCH TERM, 1861.

PRESENT:
HON. LUKE P. POLAND, CHIEF JUDGE,
HON. ASA O. ALDIS,
HON. JOHN PIERPOINT, } ASSISTANT JUDGES.
HON. ASAHIEL PECK,

THE TREASURER OF THE STATE OF VERMONT v. SAMUEL B.
MANN AND OTHERS.

Bond. Bank Director.

M. having been elected director of a bank in 1849, gave at that time a bond with sureties, conditioned for the due performance of his duties as director "while he should be a director of said bank." He was annually re-elected

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and acted as a director for several years afterward, but never gave any other bond. *Held*, that the bond did not cover his official defaults occurring after the expiration of the term of office under his first election.

Held, also, that notwithstanding the statute forbade any bank director from entering upon the duties of his office until his bond had been executed and approved, and also provided that a director should hold his office until another was appointed and qualified, nevertheless the office was to be considered an annual one, and M. was to be regarded as acting as director each year under his last preceding election.

DEBT upon the official bond of the defendant Samuel B. Mann as one of the directors of the Orange County Bank. The facts in the case sufficiently appear in the opinion of the court.

The cause was tried by the court at the June term, 1859, BARRETT, J., presiding, and judgment was rendered for the plaintiff, to which the defendants excepted.

P. Perrin and *P. T. Washburn*, for the defendants.

C. W. Clark and *Lucius B. Peck*, for the plaintiff.

POLAND, Ch. J. The principal defendant Mann, was chosen a director of Orange County Bank in January, 1849, and at that time executed a bond, in which the other defendants joined as his sureties, conditioned to secure the due performance by the said Mann, of his duties as director, "while he shall be a director of said bank" Mann was re-elected a director, in 1850, 1851, and 1852, and served as such during those years, but never executed any other bond. The alleged breach of duty by Mann as director, for which it is claimed the defendants are liable in this action on the bond, occurred after the expiration of the term of office under the election of 1849, and while Mann was acting as director under his subsequent elections. The important question in the case is, whether this bond bound the defendants for the fulfilment by Mann of his duty as director under future elections, or only for the year or term for which he had been elected. It seems now to be perfectly settled by authority, in reference to bonds or obligations given to secure the performance of official duties, that where the appointment is for a limited

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period, which is recited in the condition, or where it is not recited in the condition, but is fixed and determined by law, the obligation only extends for the period named in the condition, or the term fixed by law, and will not be extended to cover any extension of the time by a future appointment, or subsequent election, although the language of the condition as to time be general and unlimited. The presumption in such cases is held to be, that the language is used in reference to the existing office or appointment, which the principal holds, and that the sureties do not intend to bind themselves for any indefinite and unlimited extent of time, depending upon the contingency of future elections. In *Peppin et al v. Cooper*, 2 Barn and Ald. 481, BAYLEY, J., said, speaking of a bond by a collector of rates, "I do not mean to say that a bond for a longer period would be absolutely void, but merely that there ought to be very strong words to show that clearly to be the intention." But the words in that case were held not to be strong enough, though they were pretty strong words as will hereafter be seen, nor have I seen any case where they have been found strong enough. It may be worth taking time to refer to some of the principal cases on this subject.

The earliest and leading case is *Lord Arlington v. Merricke*, 2 Saund. 411. The plaintiff as postmaster general had appointed one Jenkins a deputy postmaster for six months, and the defendant executed a bond with Jenkins, conditioned that Jenkins should faithfully perform the duties of his appointment "for and during all the time that he the said Thomas Jenkins shall continue deputy postmaster," etc. Jenkins was continued in office by further appointment for some three or four years, when he became a defaulter. It was held that the defendant was only holden for the six months for which Jenkins was first appointed, that time being recited in the bond, and that the general words of the condition should be limited to that.

Liverpool Water Works Co. v. Atkinson, 6 East 507, was the case of a bond for the faithful performance of duty by a person who had been appointed an agent to collect rents for the plaintiffs. The condition recited that he had been appointed for twelve months, but it went on to add that the agent should "so long as he should continue, and be employed by the company

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from time to time," use due diligence, etc. The agent was continued in this service by the company beyond the year, and after the expiration of the year was guilty of a default. It was held that the bond only covered the year.

Wardens of St. Saviour's &c. v. Bostock, et al., 5 B. & P. 175, was an action on a bond given to the plaintiffs for a collector of church rates. The condition was in general terms that Armstrong, the collector, should collect all rates that should be thereafter put into his hands to be collected, and that he should from time to time surrender and deliver over on request to the wardens for the time being, or hereafter to be appointed, all monies collected, etc. Armstrong continued to be collector for several years by annual re-appointment, and eventually was delinquent. It was not recited in the bond that Armstrong had been appointed for one year, but as the office was by law annual, it was held that the obligation of the bond should be construed to have reference to that, and to extend and cover only the period for which he had been appointed when the bond was executed.

In *Peppin et al. v. Cooper*, before cited, the defendant executed a bond conditioned that a collector of parish rates should from time to time, and *all times thereafter*, collect and pay over, etc. In this case also, the term of the collector's appointment was not named in the bond, but as the office was by law annual, it was held that the language of the condition must refer only to his existing appointment, and not to future appointments under which the collector was continued in office.

Leadley et al. v. Evans, 2 Bing 32, (9 E. C. L. 306.) This was an action on a bond conditioned that a collector of church and poor rates, should *from time to time, and at all times hereafter* collect and pay over, etc., to the church-wardens or to their successors, etc. The collector was continued in office several years by annual appointments, and was finally delinquent, but not so during the first year. It was again decided that as the office of collector was by law annual, the language of the condition must be limited and construed by that, notwithstanding the unlimited and continuous words used; that the sureties must be understood as contracting in reference to his existing appointment, and not for any period contingent upon another election. In a very recent

English case, *Mayor &c. of Cambridge v. Dennis et al.*, reported in El. Bl. & El. 660, and also in the Jurist, vol. 5 N. S. 265, one Smith was appointed treasurer of the borough of Cambridge in 1839, and the defendants executed a bond conditioned that Smith should well and faithfully account to the plaintiffs for all and every sum and sums of money which might come to his hands, or be by him received as such treasurer as aforesaid, and should in all things well, truly, diligently and faithfully, to the best of his abilities and according to the provisions of the statute hereinbefore mentioned, and of such statutes as may be hereafter passed relating to the said office, etc. At the time of the execution of the bond, the office of treasurer was an annual appointment, and Smith was continued in office by annual appointments until 1843, when an act was passed by which the appointment of treasurer was to be during the pleasure of the council of the borough, and Smith was again appointed under this provision, and continued in office till his death in 1857, when he was found largely in arrear.

The question was in this case, whether the bond of the defendants was a continuing security for the whole time Smith continued in office, or only for the year for which he was first appointed, and it was again decided that as the office was annual when the bond was given, its language must be referred to the known period of the office under the existing appointment, and the reference to statutes which might be passed affecting the office, was only to such as might be passed within the year; though Lord CAMPBELL said, that, in his judgment, the language of the condition was so strong, that the sureties must in fact have looked beyond the current year, and acted on the supposition that the security ran on as long as the party was in office.

In addition to other cases cited by counsel where the same principle is recognized, I would refer to *Mayor of Berwick on Tweed v. Oswald*, 16 Eng. L. & E. 236; *Angero v. Keen*, 1 M. & W. 390; *Hassell v. Long et al.*, 2 M. & S., 363.

In the last named case, Lord ELLENBOROUGH said: "As the consequence of giving to the condition a more enlarged construction, so as to extend the responsibility beyond the current year, would be of so grievous and burdensome a nature, we think it requires more clear and certain words than are to be found in

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this instrument. If the bond may continue beyond the current year, it may do so for the life of the collector, during the whole period of his remaining in office; it will attach on the surety whenever the person for whom he undertakes is in default, and we know of no means subsisting at common law by which the surety can redeem himself from this interminable risk."

The leading case in this country on the subject is *Bigelow v. Bridge*, 8 Mass. 275. Bridge was elected treasurer of Middlesex county in 1790, and at that time the bond in suit was executed, conditioned that Bridge should faithfully account for all sums of money which he should receive for the county. Bridge was continued in office by annual elections till 1806, and accounted for all monies received by him except for the last year. It was held that the bond only covered the first year. This decision has been repeatedly approved by the court of Massachusetts in subsequent cases, which have been cited, and by the courts in other states.

No case has been cited, and we doubt if one can be found, in conflict with those which have been referred to. It would seem to be clear then, that if the office of director, which Mann held, is to be regarded as an annual office, and that, when his default occurred, he was acting under elections subsequent to the execution of the bond, the defendants would not be holden.

But the plaintiff claims that the office was not strictly an annual one, and that although Mann was re-elected every year, still as he gave no new bond he is to be taken as having acted as director through the whole period of four years, under the election of 1849. By the act of incorporation of the Orange County Bank, passed in 1842, the directors are required to be elected on the second Tuesday in January, annually, with a further provision, that if it should happen that an election of directors should not be made on that day, the corporation should not be dissolved, but that directors might be chosen on some subsequent day, in such manner as as shall be prescribed by the by-laws of the corporation.

It is also provided that the directors shall hold their offices for a year, and until their successors are appointed and qualified.

Sec. 58 of the bank act provides, that no director shall enter

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upon, or discharge any of the duties of his office, until his bond has been executed and approved as provided in the preceding section.

We think it perfectly apparent, that both Mann and the other directors of the bank supposed and understood that Mann acted as director for each year under the election for that year, and not that he was holding over under his election in 1849, because he had not become qualified by executing a new bond; they doubtless supposed the old bond extended and covered his subsequent elections, so that no new bond was necessary to be given.

But the plaintiff claims that as Mann could not act as a director, under a new election without giving a new bond if that was necessary, that therefore he must be treated as holding over, under the former election, however it was in fact understood and treated by him and the other directors.

But we think it was not legally impossible that he should, in fact, have acted as a director, and performed the duties of the office under and by virtue of the new election, and indeed have been a *de facto* director, so that third persons could not have questioned the validity of his acts. He was exercising the office or duty under a due election, *colore officii*, and although the bank might have refused to allow him to act as director, or the bank commissioner or the legislature might have interfered to prevent him, yet if he was allowed to exercise the duties of the office under his election without a bond, his acts, as to all persons dealing with the bank would be valid. Our statute requires that every constable before he enters upon the duties of his office, shall give bonds, etc., and if he refuses on request to do so, his office shall be considered vacant, yet it was held in *Bowman v. Barnard*, 24 Vt. 355, and again in *Bank of Middlebury v. Rutland & Washington Railroad Co.*, 30 Vt. 159, that the official acts of a constable who had been duly elected, but had given no bond, were perfectly legal and valid as between third persons and that he was a legal officer *de facto*.

These cases seem to furnish a full answer to the argument that Mann must be treated as acting under the former appointment, because of a legal impossibility to act under the new one. But even admitting, that his acts as director under the new elec-

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tion would be wholly invalid and void, and that his action was a mere usurpation of office, we do not see how this could operate to make his sureties liable.

Notwithstanding the provision that the directors should hold their office until others are elected and qualified in their stead, we are of opinion that the office must be regarded as annual. The directors are expressly required to be elected annually, and the day of election is fixed, but as there might possibly be a failure to elect on that day by the inability of the stockholders to agree, or for some other cause, provision is made for an election on a subsequent day in such cases. The statute contemplates no such thing as the directors continuing in office for several years under one election, and the sureties in a director's bond could not be supposed to understand or intend more than the legislature did, by this provision, viz: that it provided for the continuance of the office for such short interval as might be necessary to hold another election. This same provision exists in reference to all town and school district officers, who hold their offices by annual elections, but it was never supposed to divest them of the character of annual officers. The case of *Bigelow v. Bridge*, cited above, is a clear authority against the plaintiff on this point.

The Massachusetts act, authorizing the appointment of county treasurers, provided that the person elected to the office should continue in office until some other person should be chosen and qualified in his room. See *Amherst Bank v. Root et al.*, 2 Metc. 522.

In view, therefore, of all the authorities on this subject, and of the general principle applied to all contracts of sureties, that they are not to be held beyond the precise terms of their contracts, we come to the conclusion that the defendants were not bound for the official conduct of Mann as director beyond the term for which he had been elected at the time the bond was given, and that when that terminated by the expiration of the year, and a new election, and no default had then occurred, their liability was at an end.

It is asserted that for many years in this state, it was not the practice of bank directors to execute new bonds at each election, and that the general understanding was, that bonds like the

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present were a continuing security for the whole period of their continuance in office under several elections; and we have no doubt that such was the case, though how general it was, we do not know.

But such usage and practice, however general, we cannot regard as sufficient to overthrow the long and well settled rule of law on the subject, whatever might be the consequence of now judicially asserting it in this state. But for a considerable time the practice has been changed in this state by the direction of the bank commissioner. and now by an express act of the legislature, so that we do not apprehend any serious mischief can result from adhering to the rule of the law. The view we have taken of the case renders it unimportant to decide the other questions made, whether Mann's default was of that character that would make his sureties liable if it had occurred while their bond was in force.

The judgment of the county court is reversed, and judgment rendered for the defendants.

AUGUSTUS HARLOW v. GEORGE L. GREEN.*Action. Case. Fraud. Warranty.*

An action on the case will lie for false and fraudulent representations made by a vendor of land, in regard to the quantity of the same.

When a person had purchased land, relying upon the fraudulent representations of the vendor as to the quantity, and had paid for the same, but had not taken a deed, *Held*, he might nevertheless maintain an action for such fraudulent representations.

The form of declaration for false warranty of personal property used in this State, is adapted to a declaration on the case for false representations in the sale of real estate.

Action on the case for false warranty in sale of land.

The first count of the declaration was as follows: "For that

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whereas, the said plaintiff, on the 3d day of October, A. D., 1857, at Randolph aforesaid, bargained with the said defendant to buy of him a certain farm of the said defendant, whereon the said defendant then lived, situate and being in said Randolph; and the said defendant then and there, to wit at said Randolph—well knowing that the north line of the meadow on said farm was not straight but was curved, and that the farm aforesaid contained less land than would have been included in said farm, if said north line had been straight and not curved, and well knowing that one acre and one hundred and forty-seven rods of land which would have been included in said meadow, if said north line had been straight, was not the land of the defendant, and was not a part of said farm, by then and there, to wit at said Randolph, falsely and fraudulently warranting the said north line of said meadow to be straight, and not curved, falsely, fraudulently and deceitfully sold the said farm to the plaintiff, at and for a certain sum of money, to wit: the sum of thirty-seven hundred dollars, to be paid therefor by the said plaintiff to the said defendant. And the said plaintiff relying upon the said warrant of the said defendant, then and there bought said farm of the said defendant, and then and there paid to said defendant the said sum of thirty-seven hundred dollars, as the price of said farm: Whereas, in truth and fact, said north line of said meadow was not straight, but was curved, and one acre and one hundred and forty-seven rods of said meadow so as aforesaid bought by plaintiff of said defendant, and by said defendant sold to said plaintiff, was not a part of said farm, and was not the land of the defendant.

By means of which premises the said plaintiff lost great gains and profits, which he otherwise would have made and derived from the purchase of said farm, and was put to great charges and expenses at Randolph aforesaid, and so the defendant at Randolph aforesaid, on said 3d day of October, A. D., 1857, deceived and defrauded the plaintiff."

The second count was like the first, except that it also alleged that plaintiff relying upon said "warrant," not only purchased and paid for said land, but also accepted a deed thereof with the usual covenants of warranty.

To this declaration the defendant filed a general demurrer.

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The county court, at the June Term, 1860,—BARRETT, J., presiding, *pro forma*, adjudged the declaration insufficient, and rendered judgment for the defendant, to which the plaintiff excepted.

P. T. Washburn, for the plaintiff.

P. Perrin and *Converse & French*, for the defendants.

POLAND, CH. J. The important question in this case is whether a vendor of real estate, who induces the trade by making false and fraudulent representations to the purchaser, in relation to the quantity of the land, is liable in an action on the case therefor. Nothing is better settled than that the seller of personal property is liable in damages to the purchaser, if he make fraudulent representations in relation to the qualities of the property sold, whereby the purchaser is deceived and defrauded.

Why should not the same principle apply to real estate? The reason given is, that it would violate that provision of the statute of frauds, which requires that all contracts in relation to any interest in lands should be in writing, in order to be enforced by suit. But the statute does not provide that a party shall not be liable for any fraud committed in the sale or purchase of real estate, unless the fraud be evidenced by writing. We are unable to see any sound reason why a party should not be made liable to an action for fraud, in a contract in relation to land, as well as in a contract for the sale of goods, or to discover how such a doctrine conflicts with the statute of frauds. The fraud is an independent matter outside the contract.

But the affirmative of this question seems to be abundantly sustained by the authorities.

In an old case, *Elkins v. Tresham*, 1 Levinz 102, it was decided that an action would lie for falsely affirming that premises were let at £42 *per annum*, when they were let at only £32.

So when land was sold and conveyed with covenants, but the land had no real existence, and this known to the seller, so that he acted fraudently, he was held liable in an action for the fraud. *Wardell v. Fosdich*, 13 John. 326.

When land was sold bordering on a river, and the seller fraud-

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ulently represented to the purchaser that he was entitled to the adjacent land under water, by applying to the commissioners of the land office, it was held case would lie for the fraud. *Monell et al. v. Colden*, 13 John. 395.

So for fraudulently representing premises to be free from incumbrances, case has been sustained against the vendor of real estate, *Culver v. Avery*, 7 Wend. 286; *Ward v. Wiman*, 17 Wend. 193.

In *Sanford v. Handy*, 24 Wend. 260, it was decided, that a vendor of land is liable for a false representation as to its location, or as to the cost of the land.

Whitney v. Allaire, 1 Comstock 305, was the case of a lease of a water lot, and the lessor's right to a wharf adjoining. The lessee proved that the lessor fraudulently represented that he owned the whole wharf, when in fact he only owned a part of it, and the lessee was obliged to pay to another rent for the use of that part.

It was held that the lessor was liable for such representation; that where one sells or leases land, and makes fraudulent representations as to the territorial extent of the land, or as to the title, he will be liable to an action. In this case the authorities are ably reviewed by GARDINER, J. and these conclusions announced. Several of the judges dissented from the judgment given in the case, but upon other points than those named. BRONSON, J., expressed some doubts as to the soundness of the decision in this respect, but said he gave no definitive opinion.

For false representations as to the quality of land sold, the seller was held liable in *Bostwick v. Lewis*, 1 Day 350. In *Dobell v. Stevens*, 3 B. & C. 623, the vendor of a public house was held liable in an action to the vendee, for false representations as to the business of the house. The objection of BRONSON, J., in *Whitney v. Allaire*, to sustaining the action for representations as to the title, or the limits of land sold, was, that the ordinary course of business is, that, if it be intended that the vendor shall answer for the title, covenants will be inserted in the deed. A pretty good answer to this suggestion is, that the purchaser by such representations may be induced not to require a covenant, and, in relation to the quantity of the land, it is not usual in this state that deeds of conveyance contain any covenants as to the quantity of the land.

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This doctrine is fully stated by Sir Edward Sugden in his treatise on Vendors vol. 1, pages 273 and 275, secs. 22 and 28.

It is said that in this case the sale was made upon the farm, that the direction of the line, which is alleged to have been falsely represented, must have been open and visible to observation, and that if the defendant did falsely warrant, or assert, in relation to it, the plaintiff could not thereby have been deceived, unless he was wanting in that vigilance and care, which the law requires of every man. But these are considerations that cannot be regarded on demurrer, but might be very important, and perhaps conclusive, in a trial of the merits.

The form of the declaration is also objected to. One objection to the first count is, that it is not alleged that the defendant had conveyed the farm to the plaintiff. But we do not regard this as important. If the plaintiff had purchased and paid for the farm, he was as well entitled to an action for any fraud upon him in the sale, as if he had taken his deed.

It is also objected that it does not appear from the declaration, that the defendant made any false representations or affirmations as to the line; that both counts allege that by falsely warranting the line, &c., he induced the plaintiff to purchase, and that the word warrant, only implies some contract, and if that was broken the action must be upon that. This would be true if the declaration stood upon that alone; but when the declaration proceeds to allege that this was false, and known to be so by the defendant, and done to deceive and defraud the plaintiff, it is equivalent to saying that he so represented or affirmed, or rather it is more than equivalent to such words.

The declaration appears to have been copied from a form given by Mr. Chitty, a most approved author in that department of the law, and the fact that he gives such a form is pretty good authority that such an action will lie.

The form of the declaration is in substance the same as that almost universally used in actions brought to recover damages for fraudulent representations made on sales of personal property. We are of opinion that the declaration is good, both in form and substance, and that the *pro forma* judgment of the county court against it must be reversed.

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EBENEZER B. JONES v. ELI CAMP, *apt.*

School Districts.

School districts formed of parts of two or more towns may be dissolved, or their limits altered, by mutual consent.

The entire control by a town over a farm and its occupants, so far as relates to its school district taxation and connection, and the acquiescence in such acts by the district from which such farm is set, for a quarter of a century, is equivalent to an express assent on the part of the district to the separation of the farm from the school district. After such a long period of acquiescence, it may fairly be presumed that the act of the town, making the alteration, had its origin in the express assent of the district.

QUERE.—Whether one town of its own will, without the consent of the other town and the district, and against their wishes, can set off a part of such district to another district.

TRESPASS for taking certain personal property. Plea, not guilty, with notice that the property in question was taken by the defendant as collector of school district No. 8 in Chelsea, and No. 15 in Brookfield, by virtue of a regular tax bill and warrant, &c.

The case was tried upon an agreed statement of facts. It was agreed that in 1816 district No. 8 in Chelsea, and district No. 15 in Brookfield, were united by a concurrent vote of both towns, and since that time have kept up an organization. From 1816 to 1835 the farm of the plaintiff, and the persons residing on and occupying it, belonged to said district. In 1835 one Curtis owned and occupied the farm, and the town of Chelsea at their annual March meeting in that year voted to set Curtis to district No. 15, in Tunbridge, and that district voted to receive him; and after that Curtis was treated as belonging to that district by voting at their meetings, holding offices and paying taxes.

In 1845 the town of Chelsea at their annual March meeting voted to set the farm, on which Curtis had formerly resided, to district No. 1, in Chelsea. At that time the farm was owned and occupied by Caleb Douglas, who continued to be an inhabitant of district No. 1 from 1845 to 1854, when he sold the farm to the plaintiff, who has owned and occupied it ever since. In 1854 the town of Chelsea voted to set this farm to district No.

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15 in Tunbridge, and district No. 15 in Tunbridge voted to receive it; and thereupon the plaintiff sent scholars to school, voted, paid taxes, and held offices in said district. Since 1835 neither the said Curtis nor any other person owning and occupying this farm has either sent to school, paid taxes, or held office in district No. 8 in Chelsea, nor has there been any tax collected upon this farm, or against the several persons occupying it, until the present tax upon which this property was taken.

Upon the foregoing statement of facts the county court at the June term, 1860, BARRETT J., presiding, rendered judgment, *pro forma*, for the defendant.

Exceptions by plaintiff.

W. Hebard, for the plaintiff.

F. V. Randall, for the defendant.

PIERPOINT, J. It appears from the case that in 1816 a school district was formed composed of district No. 8 in the town of Chelsea, and No. 15 in the town of Brookfield, by the concurrent vote of the two towns, and that such district has kept up its organization from that time to the present; that the farm on which the plaintiff resides, and on which the tax was laid, which the defendant, as collector of said district, was attempting to collect when he took the property sued for, lies within the limits of said district as originally formed; that no attempt was made to vary or alter the lines or extent of said district from the time of its organization up to 1835; that at the annual March meeting of that year the town of Chelsea voted to set the occupant of the farm now owned by the plaintiff to district No. 15 in the town of Tunbridge, and such district voted to receive him according to the statute; that from that time the occupant of the farm acted and was treated as belonging to district No. 15 in Tunbridge, until 1845, when the town of Chelsea by vote in due form took the occupant of said farm from said district No. 15 in Tunbridge, and set him to district No. 1 in Chelsea; that said occupant continued a member of district No. 1 in Chelsea until 1854, when the plaintiff became the owner of said

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farm, when by votes of the town of Chelsea and school district No. 15 in Tunbridge, the farm was again set to district No. 15 in Tunbridge; that from that time to the present the plaintiff has acted with and been regarded as belonging to said district No. 15 in Tunbridge.

It is insisted that all these proceedings on the part of the town of Chelsea were irregular and void, on the ground that after the district was formed in 1816, the town had no control over its boundaries or its inhabitants, as members of such district; that no change could be made therein without first causing the district to be dissolved according to the provisions of the 47th section of the 20th chapter of the Compiled Statutes, relating to school districts. This section provides a method by which districts, formed of parts of two or more towns, may be dissolved; but we do not think it is the only method by which such a district may be dissolved, or its limits altered. It may unquestionably be done by mutual consent. This is fully recognized in *Pierce v. Whitman*, 23 Vt. 626. Whether one town of its own will, without the consent of the other town and the district, and against their wishes, may set off a part of such district to another district, is a question of more difficulty, and one which we do not find it necessary to decide in this case. That it may be done with the consent of such district is expressly decided in *Pierce v. Whitman* before referred to. The case here does not show an express assent on the part of the district to the acts of the town of Chelsea, but the entire control over this farm and its occupants, so far as relates to its school district taxation and connection, has been exercised by the town of Chelsea, and has been substantially acquiesced in for near a quarter of a century by the district. It is true the case shows that recently the district have occasionally laid taxes on this farm, and on one occasion asked the plaintiff to pay a tax, which he refused, and the matter was dropped. This is the only instance in which the district have ever asked for a tax, or attempted to collect one before that, out of which this controversy arose. We think it is now quite too late for them to attempt to exercise their authority over this territory; indeed it may fairly be presumed, after such a long period of acquiescence, that the act of the town in making the transfer had

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its origin in, or was done in connection with, the express assent of the district; and, at all events, after having stood quietly by and seen the transfer made, and rights thereby vested in other districts, they cannot now be permitted to come in and question its validity.

The judgment of the county court is reversed, and judgment for the plaintiff for \$2,50 and cost, according to the stipulation of the parties.

HARVEY EASTMAN V. DAVID GRANT ET ALS.

Trespass. Release.

W. having been made an agent to settle a claim which the plaintiff had against divers persons, for a joint assault, settled with two of them, and gave each of them a writing indemnifying them against any claim the plaintiff might have against them, growing out of such assault; *held*, that this was a full discharge as against the plaintiff in favor of these two.

Held, also that if it did not appear that this was not a settlement for all the damages sustained by the plaintiff, it would operate as a discharge of all the other persons engaged in the assault.

TRESPASS for an assault and battery. Plea, the general issue, with notice of special matter of defence, and trial by jury at the June term, 1860,—BARRETT, J., presiding.

On trial the plaintiff gave evidence tending to prove, that on the 17th of April, 1858, the defendants, together with Merrill Bowen and James Bowen, not parties to this suit, jointly committed upon the plaintiff an assault and battery.

The defendants then gave evidence subject to objection tending to prove, that after the committing of said assault, and previous to the commencement of this suit, and immediately after the 17th of April, 1858, the plaintiff constituted one White his agent, with full power to manage and control any right of action, which the plaintiff might have growing out of such assault, and had told White that if he could find out who committed the assault

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farm, when by votes of the town of Chelsea and school district No. 15 in Tunbridge, the farm was again set to district No. 15 in Tunbridge; that from that time to the present the plaintiff has acted with and been regarded as belonging to said district No. 15 in Tunbridge.

It is insisted that all these proceedings on the part of the town of Chelsea were irregular and void, on the ground that after the district was formed in 1816, the town had no control over its boundaries or its inhabitants, as members of such district; that no change could be made therein without first causing the district to be dissolved according to the provisions of the 47th section of the 20th chapter of the Compiled Statutes, relating to school districts. This section provides a method by which districts, formed of parts of two or more towns, may be dissolved; but we do not think it is the only method by which such a district may be dissolved, or its limits altered. It may unquestionably be done by mutual consent. This is fully recognized in *Pierce v. Whitman*, 23 Vt. 626. Whether one town of its own will, without the consent of the other town and the district, and against their wishes, may set off a part of such district to another district, is a question of more difficulty, and one which we do not find it necessary to decide in this case. That it may be done with the consent of such district is expressly decided in *Pierce v. Whitman* before referred to. The case here does not show an express assent on the part of the district to the acts of the town of Chelsea, but the entire control over this farm and its occupants, so far as relates to its school district taxation and connection, has been exercised by the town of Chelsea, and has been substantially acquiesced in for near a quarter of a century by the district. It is true the case shows that recently the district have occasionally laid taxes on this farm, and on one occasion asked the plaintiff to pay a tax, which he refused, and the matter was dropped. This is the only instance in which the district have ever asked for a tax, or attempted to collect one before that, out of which this controversy arose. We think it is now quite too late for them to attempt to exercise their authority over this territory; indeed it may fairly be presumed, after such a long period of acquiescence, that the act of the town in making the transfer had

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its origin in, or was done in connection with, the express assent of the district; and, at all events, after having stood quietly by and seen the transfer made, and rights thereby vested in other districts, they cannot now be permitted to come in and question its validity.

The judgment of the county court is reversed, and judgment for the plaintiff for \$2,50 and cost, according to the stipulation of the parties.

HARVEY EASTMAN V. DAVID GRANT ET ALS.*Trespass. Release.*

W. having been made an agent to settle a claim which the plaintiff had against divers persons, for a joint assault, settled with two of them, and gave each of them a writing indemnifying them against any claim the plaintiff might have against them, growing out of such assault; *held*, that this was a full discharge as against the plaintiff in favor of these two.

Held, also that if it did not appear that this was not a settlement for all the damages sustained by the plaintiff, it would operate as a discharge of all the other persons engaged in the assault.

TRESPASS for an assault and battery. Plea, the general issue, with notice of special matter of defence, and trial by jury at the June term, 1860,—BARRETT, J., presiding.

On trial the plaintiff gave evidence tending to prove, that on the 17th of April, 1858, the defendants, together with Merrill Bowen and James Bowen, not parties to this suit, jointly committed upon the plaintiff an assault and battery.

The defendants then gave evidence subject to objection tending to prove, that after the committing of said assault, and previous to the commencement of this suit, and immediately after the 17th of April, 1858, the plaintiff constituted one White his agent, with full power to manage and control any right of action, which the plaintiff might have growing out of such assault, and had told White that if he could find out who committed the assault

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he might have all he could make out of it ; and that on the 29th of December, 1858, White settled with Merrill Bowen and James Bowen, for the private damages for which they were liable to Eastman, and received from each of them a note for \$100, and that the plaintiff had subsequently recognized and ratified such settlement, and that upon the occasion of that settlement, White gave to each of them a paper in the following words :

“ I, Charles White, for, and in consideration of one hundred dollars, paid to me by James Bowen, [Merrill Bowen] do agree and bind myself, to pay and save harmless from all his liabilities to Harvey Eastman, sustained by being whipped and tarred at the said James Bowen's house in Washington, on or about the 17th of April, 1858. Washington, December 29, 1858.

Signed

CHARLES WHITE.”

To the admission of this testimony the plaintiff objected, and the court excluded it, to which the defendants excepted.

P. T. Washburn, for the defendants.

Peck & Colby, for the plaintiff.

PIERPOINT, J. This was an action of trespass for an assault and battery, committed by the defendants and James Bowen and Merrill Bowen jointly upon the plaintiff. It appears from the case that after the trespass was committed, and before this suit was brought, the plaintiff “constituted one Charles White his agent, with full power to manage and control any right of action the plaintiff might have growing out of said assault,” and told said White he might have all he could make out of it. That subsequently White settled with the Bowens for the plaintiff's claim upon them, for damages resulting from said trespass, received from each the sum of \$100, and gave each a writing signed by himself, and binding him to indemnify “and save them harmless from all their liability to the plaintiff, for damages that the plaintiff sustained by” reason of the said trespass, &c.

In order to determine whether or not this paper was properly excluded by the county court, when offered by the defendant,

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it becomes necessary to ascertain, first its true character and operation as between the plaintiff and the Bowens; and second its effect, if any, upon the rights and liabilities of the parties to this suit.

This paper, we think, when taken in connection with the circumstances under which it was executed, as disclosed by the exceptions, cannot be regarded in any other light, than as an absolute extinguishment of the entire claim which the plaintiff had upon the Bowens for damages sustained by him in consequence of the trespass complained of. If we treat the plaintiff as the party in interest in the transaction, and White as his agent, with full power to settle the claim, when White received the two hundred dollars from the Bowens, and agreed that they should be saved harmless from all their liabilities for such trespass, the plaintiff's claim was thereby cancelled and extinguished, not by reason of the form of the writing, or the solemnity of its execution, but by its having been fully paid in fact. If we regard White as the party in interest, by reason of the understanding between him and the plaintiff, that White might have all he could make out of it, the effect is the same. In either view, the party, making the claim for damages, has agreed with two of the parties against whom he holds the claim, what the amount of that claim shall be, and that amount was paid and the parties discharged. If no writing whatever had been given, the legal result must have been the same, the entire claim was paid and the parties thereby discharged.

What effect is this discharge of the Bowens to have upon the liability of the other persons jointly engaged in the trespass, and equally liable with them for the damages.

The principle is well settled, and is not controverted by counsel in this case, that a *release* of one of two or more joint trespassers, is a release of all, but to have such effect it must be a *technical release*, that is, by an instrument under seal. The reason why a *release* of one discharges all is, that it legally imports full payment, and, being under seal, its consideration cannot be enquired into, so that it is conclusive, even though it was given without consideration in fact. The rule is the same whether the claim is based upon a tort or a contract. Indeed the rule as to the effect of a release, is but another method of stating the uni-

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versal rule, that full payment by one who is jointly liable with others, is a discharge of all. In the one case the law regards the claim as paid, and will not allow the party to deny it by proof. In the other it is paid in fact. The effect upon the rights of all is the same in both cases.

There seems to be no conflict in the authorities in relation to these principles. Questions in relation to the effect of the discharge of one upon the liability of the others, have generally arisen, when the discharge has been given upon the payment of part of a demand, or some consideration less than a full payment of the claim against the one discharged. Such was the case of *Spencer v. Williams*, 2 Vt. 209, and *Dean v. Newhall*, 8 Term 168, cited by the counsel for the plaintiff. The first case was decided on the ground, that as the discharge was not under seal, it did not operate as a *release*, and that upon its face it was not a full discharge, but only an agreement not to sue. In the other case although the instrument was under seal, it was held not to be a *release*, but only a covenant not to sue, which all the authorities agree does not discharge the other joint debtors.

Whether the principles applicable in case of the discharge of one, on the part payment of a joint *debt* will apply in actions of this character, it is not necessary now to enquire, as we think this is not a case of part payment by the Bowens, but a case where the Bowens paid the full amount of the plaintiff's claim upon them, as adjusted and agreed upon between them at the time.

The plaintiff's claim rested solely in damages. There was no criterion by which the amount could be definitely determined. It was a matter of mere estimation, based on opinion and judgment, not of computation based on any fixed data. If the question were submitted to a jury they could determine it only by estimation. Here the plaintiff and the Bowens got together and determined the matter for themselves; they estimated the damages and fixed upon the amount of the plaintiff's claim against them, and they paid it, and were discharged. What further claim could the plaintiff have upon them, even though no discharge had been given them? Clearly not any. There is nothing in the case to indicate that the amount paid was not the full amount of the

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damages, and the extent of the plaintiff's claim on them. If the plaintiff had brought his action against the Bowens, and had received two hundred dollars damages, and they had paid the judgment, that clearly would have discharged all. If these parties agree upon the amount without the intervention of a court or jury, and the amount is paid, the effect we apprehend must be the same. The plaintiff's claim is the same against all the parties engaged in the trespass. He may pursue them jointly or severally to enforce it, but when that claim is once paid it is cancelled as to all the parties.

We think the county court erred in excluding the evidence.

This view of the case renders it unnecessary to pass upon the other questions in the case.

Judgment of the county court reversed and the case remanded.

EUNICE PRATT v. JASON BATTLES.*Deeds. Depositions. Witnesses.*

It may be regarded as the settled law and practice in this state, in making title to real estate, that a party may prove the various links in his chain of title, by certified copies of deeds from the records of deeds in the town clerk's office.

Where the defendant offered in evidence a copy of a deed, purporting to be dated the 24th day of March, 1807, which was the day of the date of a defective deed which plaintiff had introduced, which was between the same parties and substantially identical, in terms at least, with the defective deed but which was not recorded until 1836, and the plaintiff claimed it was a forgery; held, that the copy of the deed was properly admitted, and that the question as to the genuineness of the original was one for the jury.

The law which permits a party to show on the trial of a case that the other party has used means to induce witnesses on the other side to absent themselves from court, does not apply to a party to the suit, unless he is a mere nominal party; and the fact that an agent of the party had acquired a lien on the judgment would not change the rule.

The defendant gave notice to the plaintiff of the time and place of taking a deposition. When the agent of the plaintiff arrived at the place appointed

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for the taking of the deposition the justice had commenced to write out the deposition, and on the appearance of the plaintiff's agent, the defendant's agents, the justice, and the deponent, all withdrew to another room, and completed the direct examination of the deponent, and would not allow the plaintiff's agent to be present, although he insisted upon his right to be present. It was held that the deposition was improperly admitted, and the subsequent cross-examination of the deponent by the plaintiff's agent was no waiver of the irregularity in taking the previous part of the deposition.

The interference of a party in the taking of a deposition by suggesting and dictating answers to the witness, so as to render it doubtful whether the answers taken down were such as the witness would have given if left free to dictate his own answers, is sufficient to exclude a deposition.

When the ruling of the county court in admitting a deposition is *pro forma*, it is open to revision by this court.

QUERE.—Whether open to revision generally.

TRESPASS for a quantity of wood. Plea, the general issue, and trial by jury, at the January term, 1860, BARRETT J., presiding.

The plaintiff gave evidence tending to prove that the defendant took a large quantity of wood from lots 47 and 48, in Braintree. To make title to the wood and lots she gave in evidence a record copy of a deed from Jacob Spear to herself and others, dated July 1, 1802, by which said lots were conveyed to her. The plaintiff was married to Charles Pratt previous to the execution of the deed to her, and soon after said deed was executed she and her husband moved on to said lots and occupied them two or three years.

The plaintiff also gave in evidence a record copy of a deed from herself and husband to Lebbeus Edgerton and William Ford, Jr., dated March 24, 1807, conveying to them the same lots. It was proved that whatever title this deed conveyed passed through various persons until it became vested in one E. Parmelee under whose permission the wood in question was taken by the defendant in 1849 and 1850.

The plaintiff lived with her husband until 1848, when he died, and the plaintiff then claimed to own and be entitled to the possession of the lots, on the ground that the deed from herself and husband to Edgerton and Ford was void as to her, for the reason that her acknowledgement of the deed was not taken separate and apart from her husband, as required by law at that time.

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The defendant, in order to show that the plaintiff had no title to the lots, offered in evidence a certified copy of what purported to be a deed from the plaintiff and her husband to said Edgerton and Ford of the same lots, and bearing the same date as the one given in evidence by the plaintiff, but not recorded until 1856. The plaintiff claimed that this deed was a forgery, and objected to the admission of the copy in evidence until the existence of the original was shown and produced, or its non-production was accounted for, which objection was overruled, the court holding that the question whether it was a forgery or not was the main subject of controversy, and was to be settled by the jury upon all the evidence, and said copy was therefore admitted, to which the plaintiff excepted.

The defendant then gave evidence tending to show that on the day said deed was recorded his agent found the same among the papers of Ford, who died about 1830, and that he sent it for record the evening of the same day, and took it away as soon as recorded, and on or about the 21st day of April enclosed it in a letter directed to C. Blodgett, Esq., then in Canada, who was the agent of Parmelee, and at whose request he had made search for it, and that said letter had never been received, and on application to several proper post offices in Canada it could not be found by Blodgett.

The defendant then gave evidence tending to show that on the 24th day of March, 1807, Pratt and his wife, (the plaintiff,) executed one deed of the lots of land in question to Edgerton and Ford, before Edgerton arrived at the place where the writings were made, and when he arrived he objected to that deed for some informality in its execution, and that thereupon a second deed was made out of the same lots, and executed by Pratt and wife to Edgerton and Ford; that Charles Pratt at the same time executed other deeds of other lands, held in his own right, to Edgerton and Ford, and that all these deeds were then delivered to Ford, who resided in Braintree, to send or convey to the town clerk's office for record; that after the decease of Ford an old looking unrecorded deed, filed on the outside "Pratt and wife to Edgerton and Ford," was seen among his old papers in the same trunk where the unrecorded deed between the same parties was found in April 1856, which was recorded, as before stated.

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The plaintiff then gave evidence tending to show that she executed only the deed, a copy of which she gave in evidence as before stated, and that the deed so secretly recorded was a forgery, and among other evidence given for this purpose was her own deposition, which was read to the jury.

The defendant then gave in evidence the deposition of the plaintiff, taken on his part in 1860. in which she testified that she might have executed two deeds.

It was then offered, in support of this suit, to prove that the plaintiff some time since had agreed with one Charles Spear, who had become bail in this case, that he should have the benefit of this suit and a lien upon the judgment, if one was obtained for the plaintiff, to indemnify him for such liability, and for security for the payment of such other liabilities as he might incur in carrying on the same, and for such sums as he should pay out therefor; that Spear had incurred expenses, relying, in part, upon such lien, and that all this was known to the defendant and his agents; that the plaintiff had said to the defendant's agents that she did not intend to state any thing different, in the last deposition, from what was stated in the first, so far as related to said deed; that if she had she desired to put the matter right; that the defendant's agent then told her that said depositions were not inconsistent with each other; that Spear a few days before the court applied to her to come to the present term of this court to testify as a witness relating to this cause, when she expressed a willingness to do so, but that the agent of the defendant prevailed upon her to decline going, and when Spear then requested her to give her deposition the same agent induced her to refuse. This evidence was objected to by the defendant, and excluded by the court, to which the plaintiff excepted.

The defendant, in the course of the trial, offered the deposition of Micah Ford, to the admission of which the plaintiff objected, for irregularity in its taking, and called witnesses to prove what occurred when it was taken. The evidence upon this point showed substantially the following facts.

A notice for the taking of said deposition had been duly served on P. Perrin, attorney for the plaintiff; and one Montgomery, and one Bass, went as agents of the plaintiff, to be present at the taking of the same; on arriving at the appointed place, and going

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into the house, they found the justice in the process of taking the deposition, and that he had partly taken the same, Beriah Battles and Ephraim Thayer being present and acting as agents and attorneys for the defendant.

Immediately after the arrival of the plaintiff's agents, by direction of the defendant's agents, the justice and witnesses, with the defendant's agents, went into another room and there, apart from the plaintiff's agents, completed the taking of the residue of the direct examination of the deponent. The plaintiff's agents requested and insisted on being present, but the defendant's agents objected; and, with the concurrence of the justice, they were excluded, and were not present at the taking of any part of the direct examination of the deponent.

After the direct examination was completed the justice and the agents of the defendant returned into the room where the plaintiff's agents had been waiting in the meanwhile, when the direct examination was read over by the justice, and the plaintiff's agents took and read the same, and then proceeded to cross-examine the witness, as is shown by said deposition, this cross-examination being attended with great wrangling and confusion between the agents of the respective parties, caused mainly by the agents of the defendant interfering, upon the asking of questions, to suggest or dictate the answers which the witnesses should give; in many instances they did so interfere, but the justice endeavored to take down the answers of the witnesses, as he meant and designed to have them taken down, and to give a fair and full cross-examination, but whether they were such as the witness meant to give, and have taken down, if said agents of the defendant had withheld their interference by way of suggestion and dictation, cannot be determined with certainty, though probably they were not so in all respects. The deponent was aged about seventy-five years, and was infirm.

Upon these facts the court *pro forma* admitted the deposition, and it was read as evidence in the case, to which the plaintiff excepted.

Under the rulings of the court, as above set forth, the plaintiff consented that a verdict might be taken for the defendant, with leave to except to the various decisions of the court.

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Verdict and judgment for the defendant. Exceptions by the plaintiff.

P. Perrin and L. B. Peck, for the plaintiff.

William Hebard and P. Dillingham, for the defendant.

PECK, J. This is an action of trespass for a quantity of wood. Plea, the general issue and trial by jury. The cause comes here upon exceptions to several rulings of the county court in the course of the trial.

It appears from the case that the wood in question had been cut upon lots Nos. 47 and 48, in the first division of lands in Braintree, previous to the taking by the defendant in 1849, complained of in the declaration. Both parties seek to make title to the wood by showing title to the land on which it was cut. The plaintiff introduces a deed from Jacob Spear to her, dated July 1, 1802, with proof that soon after the execution of that deed, she and her husband moved on to the premises, and occupied them about two or three years. She then introduced a copy of the record of a deed from her and her husband to Lebbeus Edgerton and William Ford, dated March 24, 1807, recorded April 4, 1807. Both these deeds purport to convey the lots in question. It appears that the last named deed was inoperative against the plaintiff for a defect in the acknowledgment by her, it not appearing by the certificate that she was examined separate and apart from her husband, agreeably to the statute then in force.

It appears that the plaintiff was married prior to the deed to her, and lived with her husband till 1848, when he died.

It also appears from the case that the defendant took the wood under the authority of one E. Parmelee, who holds the lots in question under a regular chain of conveyances from the grantees in said defective deed from the plaintiff and her husband, executed in 1807, as above stated.

As the defendant justifies under a title derived from the plaintiff through this defective deed, it is clear that this makes a title, as between these parties, in the plaintiff.

The defendant then offered a copy of record of a deed from

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the plaintiff and her husband to said Edgerton and Ford, dated the day of the date of the defective deed from her and her husband to them, purporting to be regularly executed and acknowledged, but not recorded till April, 1856. This deed, of which the copy of record offered purported to be a copy, the plaintiff claimed was a forgery, and not a genuine deed, and objected to the introduction of the copy until the original should be produced or its non-production accounted for, as in cases where the original is the only primary evidence.

It may be regarded as the settled law and practice in making title to real estate that a party may prove the various links in his chain of title by certified copies of deeds from the records of deeds in the town clerk's office, without the production of the originals, except the deed to himself, in proof of which he must produce the original, because it is supposed to be in his custody.

Such copies are admissible mainly upon the ground of the faith that is due to the acknowledgment certified by the proper officer as *prima facie* proof of the genuineness of the instrument, and partly upon grounds of convenience, the originals not being supposed to be in the possession of the party, there being no such practice here, as in England, of the custody of the title deeds passing to the successive grantees.

Was there any thing in this case to warrant or require the court to dispense with this rule, and require the production of the original before admitting the copy? To determine whether there was error in the county court in not doing so, we must look at the state of the evidence at the time the copy was offered and admitted. It is true the defendant claimed that it was a forgery, but if this alone would require the original to be produced, the same claim might be set up in every case, and thus in every case the party would be obliged to produce the original or account for the non-production of it by proof. It appears that the copy offered purported to be dated the day of the date of the defective deed which the plaintiff had introduced, and was between the same parties, and identical in terms with it, substantially at least, and not recorded till 1856. Without deciding whether or not such *prima facie* evidence of fraud or forgery might be shown, or appear, as to warrant the court in requiring

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the production of the original, the court think in this case, whatever suspicions may have arisen from the circumstances when the copy was offered, that the county court were right in admitting it and submitting the question as to the genuineness of the original to the jury.

The next objection is to the rejection by the court of the evidence offered by the plaintiff as to the statements made by the defendant's agent to the plaintiff and his conduct in inducing the plaintiff not to be present in court as a witness. It appears that the plaintiff gave a deposition to be used in her behalf tending to show that she executed but one deed to Edgerton and Ford; that the defendant afterwards took her deposition, which tends to show that she might have given two such deeds; that it came to her knowledge afterwards that it was claimed that she had testified differently in relation to the deeds in the second deposition from what she did in the first, and that she told the defendant's agent that she did not intend to state differently in this particular in the second deposition from what she did in the first, and that if she had, she desired to put the matter right; that the plaintiff's agent, who had by agreement with the plaintiff, acquired an interest in the judgment that might be recovered to secure him for advances he had made in carrying on the suit requested her to be present at the trial and testify; and that she expressed a willingness to do so, but was induced by the defendant's agent not to come, and was told by him that her second deposition was not different from the first. This evidence was rejected. It has been decided in this state that it is competent, under certain circumstances, for one party to show that the other party has used means to induce witnesses on the other side to absent themselves from court; and in this case, if the deponent was a mere witness in the case and not a party, or a witness and but a nominal party, the conduct of the defendant's agent in falsely representing to her as he did and inducing her not to appear as a witness, would be admissible as tending to show that he knew there was some mistake or fraud in procuring such deposition as he had procured from the plaintiff which would be explained or exposed if she attended and testified; and thereby add credit comparatively to the deposition first taken in the par-

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ticular in which it differed from the one taken by the defendant. But although the plaintiff's agent had a lien on the judgment, yet the plaintiff must be regarded as the real party, still having the primary interest in the suit; and as it appears that the plaintiff's agent was present and the plaintiff was informed of the discrepancy in her two depositions, so that she had an opportunity to appear and testify if she chose, the evidence offered was not admissible. Under these circumstances, the plaintiff, being a party in interest, stands in a different light in this respect from a mere witness.

This testimony was properly rejected.

The next error complained of is the decision of the court in admitting the deposition of Micah Ford under the plaintiff's objection, founded on the irregularity in taking it.

It appears that the plaintiff was duly notified of the time and place of taking the deposition; that when the plaintiff's agent arrived at the place the defendant's agents had commenced taking the deposition. Thus far no irregularity appears, because it does not appear that they commenced before the time set in the notice.

But immediately on the arrival of the plaintiff's agents the agents of the defendant induced the justice to withdraw with them and the witness into another room, and excluded the agents of the plaintiff, and completed the direct examination in the absence of the plaintiff's agents, who insisted on being present.

This was clearly such an irregularity as to exclude the deposition. The statute, giving the right to use depositions, provides that they shall be taken "*in the manner*" prescribed, and among other things it is provided that notice shall be given to the adverse party "*so that the party may have a reasonable time to appear and be present at the taking of such deposition.*" This is the very language of the statute. This privilege or right the plaintiff has been deprived of by the wrongful act of the party taking and offering the deposition. At common law it is regarded as important that testimony shall be given by witnesses in open court, in the presence of the court and jury and of the adverse party or his counsel. The statute which for convenience authorizes in certain cases the use of testimony taken out of court by

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deposition, carefully preserves the right of the adverse party to be present, and this right the plaintiff has been deprived of. The statute in this case has not been complied with either literally or substantially; and under the numerous decisions in this state requiring a strict compliance with the statute in matters of *form*, it is clear that a departure, not only from the terms but from the spirit and substance of the statute, in a point so important to the interests of the adverse party, must render the deposition inadmissible.

It is no answer to say that the plaintiff, after the direct examination was completed, had an opportunity to cross-examine. The adverse party has a right to be present during the taking of the whole testimony. He has a right to see that the examination is regularly conducted, that the testimony is not drawn out by leading or improper questions, that the witness is left free to dictate his own answers, and that the testimony is correctly and fully taken down, and that no part material to his interests is omitted. It is no answer to say that it is incumbent on the plaintiff to prove that it was not done so, after the defendant has designedly excluded the plaintiff from all means of knowing or proving what did transpire. But if proof were necessary it is not wanting in this case. What transpired immediately after on the cross-examination is quite satisfactory proof that all was not regular on the direct examination.

But it is claimed that the cross-examination *in fact* of the witness by the plaintiff is a waiver of the irregularity in taking the previous part of the deposition. It is undoubtedly true that in many cases under other circumstances it would be so; as where a party appears and finds that the body of the deposition is already prematurely written, and the party proceeds without objection to cross-examine, thereby inducing the other party to suppose it is satisfactory and to rely on it as such, it should be treated as a waiver. But here the plaintiff's agents protested against the taking of the direct examination while he was excluded from the room, and nothing transpired afterwards tending to show that there was any intentional waiver, or to show that the other party had any just ground to understand it so. But if it would have been a waiver had the plaintiff been

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allowed to cross-examine the witness as he had a right to, it is clear that it is not so in this case, since the case shows that during the cross-examination there was such an interference with the witness by the agent of the defendant in suggesting or dictating the answers which the witness should give, as to render it doubtful, at least, whether the answers taken down were such as the witness would have given if left free to dictate them himself. This attempted cross-examination, which was thus substantially defeated by the wrongful interference of the defendant's agents, can not be treated as a waiver of the previous irregularity, unless one irregularity is cured by another committed by the same party, both tending to suppress or pervert the truth.

But if no other objection appeared, this interference on the part of the defendant's agents, by suggesting and dictating answers to the witness, to the extent and in the manner stated, is sufficient of itself to exclude the deposition.

This is a power exercised in chancery in suppressing testimony, and in cases of testimony taken under a commission at common law; and under our statute authorizing the taking of depositions it is equally necessary to ensure the due administration of justice and the proper protection of the rights of the parties.

But it is claimed that it is a matter within the discretion of the county court, and that for that reason the decision of the county court can not be reviewed by this court. But we are not prepared to say that it is so exclusively a matter of discretion that the decision of the county court is in all cases conclusive; but in this case the exceptions show that the ruling of the county court admitting this deposition was *pro forma*, which shows that the county court did not attempt to exercise their judgment or discretion in the matter, and in such case it must be open for the decision of this court. For this error in admitting this deposition the judgment of the county court is reversed and a new trial granted,

Arnold v. Sprague.

SPRAGUE ARNOLD, JR. v. EDWARD SPRAGUE.

Bills of Exchange. Agency.

It is not essential to the validity of a bill of exchange or promissory note, that it should be negotiable.

The order in this case held to be a bill of exchange.

Bills of exchange are presumed to be upon a sufficient consideration, and may be accepted by parol.

The taking a bill of exchange on a previous indebtedness is *prima facie* a payment of the debt.

After acceptance the drawee cannot set up as against the payee, that as between him and the drawer there was no consideration.

Where one accepts a bill in order to enable the drawer to obtain credit or money, though there is no consideration between the drawer and acceptor, and though the subsequent holder for value knows it to be accommodation paper at the time he takes it, he can enforce it against the acceptor.

A debt from the drawer to a third person, is a good consideration for the acceptance of a bill of exchange.

Parol evidence is not admissible to vary the legal effect of a bill of exchange, or to add a party to it, who does not appear on its face.

If an agent sign only his own name whether as drawer, indorser or acceptor, he will be considered as principal, and be personally liable as such, unless he adds some restrictive or qualifying words, and this though his agency was known to the other party.

It is well settled that the use of the word "agent" alone, without saying for whom he is agent, is not sufficient to relieve the agent from responsibility, or to bind the principal.

This was an action of assumpsit upon the following order :

MR. EDWARD SPRAGUE :— SIR :— "Pay Sprague Arnold, Jr. ten dollars and ninety-six cents and charge the same to me.
Randolph, December 15, 1856.

(Signed)

G. H. BURT."

Plea, non assumpsit and trial by the court by agreement of the parties.

The plaintiff gave in evidence the order, and the court from the evidence found the following facts :

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In the spring of 1856 the defendant, John Weston and P. Morey, were appointed by the school district in which they resided, in Randolph, a committee to build a school house, and contracted with said Burt to build the house for the sum of \$550, and a certain old building standing on the site of the school house to be built. Said Burt proceeded in the building of said house, and said committee made frequent payments to him, and became liable for him for materials for said building from time to time, various persons taking orders of said Burt on said Sprague, who was the active man of said committee in contracting and superintending the building of the school house, and paid the principal part of the expense thereof, and received and paid the orders drawn on him in that behalf. The plaintiff received said order from said Burt at about the time of its date, said Burt being indebted to the plaintiff in the sum named in said order. Said order was drawn for and in consideration of said indebtedness. The plaintiff presented said order to the defendant soon after receiving it for acceptance. The defendant declined then to accept it, but promised the plaintiff that he would accept and pay it, if on settlement with Burt, there should be sufficient due him and remaining unpaid in defendant's hands. In a few days afterwards the plaintiff called again on the defendant to see if the defendant had ascertained whether he could accept and pay the order. The defendant replied that he had not, and the matter remained as under the first application by plaintiff to defendant. In a few days afterwards on some looking over of the state of affairs by Sprague, in behalf of the committee, and by Burt, it was found, as was then supposed by Sprague and Burt, that including what had been paid by the committee to Burt, and on his account, and the orders accepted on his account, and including plaintiff's order, there was an unpaid balance still due to Burt. Whereupon the defendant promised Burt in reply to Burt's inquiry in that behalf, that he would accept and pay the orders that Burt had drawn upon him, including the plaintiff's said order, which was then in the defendant's hands. Burt immediately thereupon informed the plaintiff that the defendant had accepted, and would pay, his order, informing him at the same time of what had taken place between him and the

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defendant. The plaintiff soon thereafter called on the defendant and told him what Burt had said, and asked the defendant if he had accepted and would pay this order. The defendant told him he had accepted and would pay it. Said acceptance and promise were not in writing, but merely verbal, as above set forth. They were unqualified and absolute on the part of the defendant, and so understood by the plaintiff. At the time of receiving and presenting the order, as well as at the time of its acceptance as aforesaid, the plaintiff understood that the defendant was one of the building committee, and was not indebted to Burt otherwise than for the building of said school house, and owed him nothing in his private capacity. After the acceptance of, and promise to pay the order as aforesaid, on a settlement between the committee and Burt, as well as between the committee and the district, it was ascertained that the committee had overpaid Burt some \$10. The defendant claimed and contended that the foregoing facts did not create a liability upon the defendant, for the reason that the acceptance was in parol; that there was no consideration for a promise, and for the reason that the money sought to be reached by the order was not the money of the defendant, but the money of the district and for the reason generally, that the facts were not sufficient to create any liability on him. The county court at the June term, 1860, BARRETT, J., presiding, rendered judgment for the plaintiff. Exceptions by defendant.

William Hebard, for the defendant.

P. Perrin, for the plaintiff.

ALDIS, J. It is not essential to the validity of a bill of exchange or promissory note, that it should be negotiable.

The advantages arising from the negotiability of such instruments was originally the reason why they were held to be exceptions to the general rule of the common law that choses in action were not assignable. Hence it was once considered that negotiability was essential to such instruments. But for a long time, both in this country and in England, it has been held, and is now settled law, that they need not be negotiable.

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Chitty on bills 159, and cases cited. *Kendall v. Galvin*, 15 Maine 131.

The order now in question has all the elements essential to a bill of exchange—it is an open letter of request from one to another to pay a third person a certain sum of money.

In *Fisher v. Beckwith*, 16 Vt. 31, an instrument like the one in this case, (except that there it was negotiable,) was held to be a bill of exchange; and that difference does not affect the validity of the order as a bill of exchange.

So it is well settled that an acceptance of a bill of exchange may be by parol. This is so by the common law, and was recognized in *Fisher v. Beckwith*, as the rule in this state. That it is an inconvenient rule, and tends to make one's liability upon written instruments to depend upon parol evidence, and so to open a door for perjury and fraud, has often been remarked, and has led in some states to the enactment of statutes requiring all acceptances of bills of exchange to be in writing. But it is the law.

In the case at bar the bill or order was drawn on the defendant personally, and his acceptance is stated in the bill of exceptions to have been absolute and unqualified.

I. It is claimed that he is not liable upon such acceptance, because it was without consideration.

The general doctrine that bills of exchange are presumed to be upon a sufficient consideration is not questioned. But it is urged in this case, that the acceptor was not in fact indebted to the drawer, and had no funds in his hands, and that this is such a want of consideration as may be shown in bar of this action, by the payee against the acceptor.

The drawer (Burt) was indebted to the plaintiff, who is the payee named in the bill, to the amount for which the bill was drawn, and this was known to the defendant, the drawee. When the bill was presented for acceptance the defendant was in doubt whether he was in debt to Burt or not. So he told the plaintiff to let the matter rest till he settled with Burt, and then if he owed Burt as much as the bill was drawn for he would accept it. He afterwards settled with Burt, found, as they then supposed, that he was indebted to him to the amount of the bill,

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and accordingly immediately thereafter, by parol, accepted the bill absolutely and unconditionally. He afterwards discovered an error in the settlement of the account with Burt, which, when corrected, showed that he was not in debt to Burt at all, but that Burt was in debt to him.

The defendant claims that these facts show such a want of consideration between him and the plaintiff, as to release him from liability on his acceptance.

Clearly as between the defendant and Burt, these facts show a total want of consideration, so that if Burt had sued the defendant on his default of payment, after acceptance to pay, the defendant might have shown them in bar of the action. It would be just the same as if the defendant had given Burt a promissory note for a supposed balance when nothing was due.

But as between the plaintiff and the defendant, the case is different. The consideration as between them is not the debt, which may or may not be due from the defendant to Burt; but the debt acknowledged to be due from Burt to the plaintiff. The debt of a third person has always been held to be a sufficient consideration. The defendant by accepting the bill agreed absolutely with the plaintiff to pay him the amount of it—knowing that amount was a debt due from Burt to the plaintiff. It was an agreement to pay Burt's debt to the plaintiff. The defendant does not offer to show that there was no debt due from Burt, and that the plaintiff has taken it without value. It is therefore an absolute promise by the defendant to pay the plaintiff the amount of the bill in consideration of Burt's request to pay the plaintiff a debt due from Burt to the plaintiff of the same amount.

It was for the defendant to ascertain before accepting the bill, whether he owed Burt or not. That was a risk which he took upon himself. The plaintiff had no means of knowing how that fact was. He had a right to assume that the defendant would not accept the order unless he had funds of the drawer, or other securities in his hands to make him good for the acceptance, or unless he chose to do it, upon the request and credit of the drawer, and run his risk of ultimate payment. The defendant knew that the plaintiff would rest upon such assumption, and rely upon his acceptance of the order, and would cease to look to Burt for

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payment—would omit to take proceedings to collect his debt of Burt, and rely in the first instance at least, upon getting his money through payment of the acceptance. The drawing and acceptance of the order created new legal relations between the parties. The plaintiff would no longer look to Burt for the payment of his debt in the first instance, and Burt would understand that if the plaintiff failed to collect the order of the defendant, through his own negligence, and failed to take proper steps to make him liable as drawer, that he would be discharged. Let us suppose that the defendant instead of accepting the bill had joined with Burt in a note to the plaintiff for the amount. Could he have plead in bar of a suit on the note, that at the time he signed he supposed he owed Burt as much as the note, but that he made a mistake in settling, and that in fact he owed him nothing? It is not necessary to decide that the taking of the order, and procuring it to be accepted, would operate as payment of Burt's debt to the plaintiff, either *prima facie*, or absolutely; so that the remedy of the plaintiff against Burt would be only upon the paper in default of payment by the acceptor. It would seem as if the taking of a bill of exchange upon a previous debt, would, after acceptance, be at least *prima facie* payment, like the taking of a promissory note;—especially as the payee has an additional security in the name of the acceptor. However that may be—we are clear that after acceptance, the defendant has no right to set up as against the plaintiff, and in discharge of his liability, that as between him and the drawer there was no consideration. That is not enough. *Grant et al. v. Ellicott*, 7 Wend. 227; *Chitty on bills* 305; 16 Wend. 557; *Cole v. Cushing* 8 Pick 48; *United States v. Bank of the Metropolis*, 15 Pet. 377; 15 Maine 131.

Where one accepts a bill in order to enable the drawer to obtain credit or money, though there is no consideration between the drawer and acceptor, and though the subsequent holder for value knows it to be accommodation paper at the time he takes it, he can enforce it against the acceptor. It is the object of the parties to obtain a credit or money, and the parties cannot recede from their bargain. Here the transaction was not for accommodation, nor was it so understood by the parties. They all sup-

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posed it was for value, as between them all. Although they find afterwards that there was no consideration as between the drawer and acceptor, and that they were mistaken as to the state of their accounts, still as the mistake was not in any way occasioned by the payee of the bill, but wholly by the negligence of the other parties, and as the bill was given to the payee for a debt due to him from the drawer, we think there was a sufficient consideration for the acceptance, and that the payee can recover upon it against the acceptor.

The case of *Rogers v. Waters*, 2 Gill and Johns. 64, which has been referred to, we have not seen. The summary of it as stated in a note to Chitty on bills, p. 74, we should consider a very questionable doctrine of law.

II. The next question which arises in the case, is, that the defendant was known by the plaintiff to be the agent of the school district, and, in agreeing to accept for Burt, was known to do so not on his own account or because he owed Burt, but because the district owed Burt,—and that therefore the acceptance bound the district only, and not the defendant.

It was also urged that as the defendant owed Burt nothing his personal promise by acceptance to pay the plaintiff the amount of Burt's debt, upon the supposed indebtedness of the district to Burt, was without consideration, so far as he was concerned, and, therefore void. But we do not think it makes any difference in the case, *so far as consideration is concerned*, whether the acceptance was by him personally, or as agent for the district; for neither he nor the district owed Burt anything. The validity of the consideration does not depend upon whether anything was due to Burt, but upon this, that the defendant either personally, or as agent, upon the request of Burt, agreed to pay to the plaintiff the amount of a just debt which Burt owed the plaintiff. It is the debt from Burt to the plaintiff that constitutes the consideration of the defendant's promise, and enables the plaintiff to hold the defendant bound by his acceptance. So far therefore, as the question of consideration comes up, it is not affected by the fact that the plaintiff did not owe Burt. Neither the plaintiff nor the district owed him.

The sole question then is, can the defendant be held person-

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ally upon his acceptance, when it appears that he was acting throughout the transaction for the district, and this known to the plaintiff.

The suit is upon a bill of exchange. The defendant is sued as acceptor. In such suits the whole liability must be made out on the written instrument itself. Parol evidence is not admissible to vary the legal effect of the bill—to add a party to it who does not appear upon its face. This principle is laid down in all the elementary books. Thus Mr. Chitty, in his treatise on Bills, p. 83 says: “If an agent sign only his own name whether as drawer, indorser, or acceptor, he will (unless in the case of a government agent contracting on its behalf) be considered as the principal, and be personally liable as such, unless he adds some restrictive or qualifying words, as “without recourse to me,” &c.: for it is a universal rule, that a man who puts his name to a bill of exchange, thereby makes himself personally liable, unless he states upon the face of the bill that he subscribes it for another, or “by procuration of another,” which are words of exclusion; unless he says plainly, “I am the mere scribe,” he becomes liable.” This latter part of the sentence is quoted from Lord Ellenborough in *Leadbitter v. Farrow* 5 M. & S. 349. To bind the principal his name should appear on the instrument; and it should also appear that the agent acts for, and on behalf of, the principal. It appears to be settled that the use of the word “agent” alone, without saying for whom he is agent, is not sufficient to relieve the agent from responsibility, or to bind the principal. “So where it is known that a party is acting as agent, or a draft is addressed to him as agent, yet if he give or accept it in his own name, he is personally liable; and, as a converse of this proposition, his principal is not liable.” These are the words of Ch. J. SHAW in *Taber v. Cannon et als*, 8 Met. 460, where he refers to authorities in England and Massachusetts to sustain the doctrine. See also *Pentz v. Stanton*, 10 Wend. 271; 20 Wend. 431.

In the Am. Lead. Cas. 502, et seq., the cases on this subject are collected and compared, and the doctrine seems to be settled beyond dispute.

In the case at bar the draft was drawn on the defendant, and

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accepted by him personally. There is nothing on the face of the instrument to show that he was agent. There can be no doubt therefore, that he is personally liable on the acceptance, though his agency was in fact known to the plaintiff.

III. It has been urged in this case that the parol acceptance is a promise to pay the debt of another, and is not in writing, and so void by the statute of frauds. If this were not a bill of exchange this position would be unanswerable—but as we hold it to be a bill of exchange, the parol acceptance becomes an exception to the rule. In England where it was held that the writing required by the statute, must state the *consideration* of the promise, (which bills of exchange and promissory notes omit, using instead the formula “for value received,”) bills of exchange and promissory notes given for the debt of another, have always been held as valid—upon the ground that they were mercantile instruments in use before the statute of frauds, and the undertaking upon them is original and not collateral. Upon that distinction we should also be bound to hold here that the parol acceptance of a bill would be sufficient.

Judgment affirmed.

ORANGE FIFIELD v. G. W. & R. RICHARDSON.

Void Execution. Res gesta. Evidence.

An execution issued for sixty days when it should have been issued for one hundred and twenty days, is void; and the return of the officer upon it that the judgment has been satisfied is void also; and the judgment, notwithstanding all that may be done under such an execution, will stand in full force, precisely as it did before the execution was issued.

The case of *Bond v. Wilder*, 16 Vt. 393, approved.

A transaction cannot be considered as ended so long as the parties thereto remain together, and anything according to the usual course of business

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remains to be done in regard to it and until thus ended, whatever may be said by the parties concerning it, will be considered a part of the *res gesta*, and admissible in evidence.

DEBT on judgment rendered by a justice of the peace in 1848, and brought into the county court by appeal. Plea, *nul tiel record*, payment, and notice of satisfaction by sale of property on the execution.

Trial by jury, at the January term, 1860, BARRETT, J., presiding.

The plaintiff introduced testimony tending to prove that in September, 1848, he and others prayed out nine writs of attachment against the defendants, either jointly or severally, upon which their property was attached by a deputy sheriff; that judgments were duly recovered in all the suits, and executions issued and placed in the hands of the same sheriff, who, by virtue thereof, sold all the property of the defendants, and to the amount of forty three dollars and fifty-nine cents more than enough to satisfy all the executions in his hands, which were returned satisfied in full; that afterwards the defendants employed one David Holbrook to collect back the money that was in the officer's hands, and also damages for selling more property than was required to satisfy the executions; that Holbrook commenced an action against the plaintiff in this suit and the deputy sheriff for selling the hay of G. W. Richardson, and that the same was settled on the eighteenth day of June, 1849, by Fifield's paying to Holbrook the sum of ninety-two dollars, and that the parties thereupon executed receipts in full for said trespass on the one part, and in full discharge of the execution on the other.

The plaintiff's evidence further tended to show that in the fall of 1849, David Holbrook made claim on Fifield, that his (Fifield's) execution issued on the judgment upon which this suit was founded, was void, as it ran but sixty days, instead of one hundred and twenty, and insisted upon having the money paid thereon refunded to him by virtue of his having a subsequent attachment on the same property, and also by authority as agent for the Richardsons, and that Fifield yielded to the demand, and paid back the money to Holbrook. It further appeared from the testimony of the plaintiff, that this demand and payment took place in his store, in the month of January or February 1850,

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in the evening, and that after the payment of the money to Holbrook, he demanded a receipt therefor; that Holbrook declined to give him one, saying that the papers all showed, and the persons there present might all understand, that Fifield had paid him the money on said illegal execution.

The plaintiff then introduced Timothy Hancock as a witness who testified that subsequent to the year 1849, and prior to the spring of 1852, sometime in the fall or winter, in the evening, he went into the plaintiff's store, and that Holbrook was there; that he (the witness,) was already acquainted with the history of the plaintiff's illegal execution; that as he went into the store, the plaintiff said to him, (the witness,) "I have just paid the money to Holbrook on the old illegal execution," to which Holbrook replied, "yes, Fifield has paid it, and I have got the money. Fifield, after inquiring all round, has finally concluded to pay me the money on it;" that Fifield then said, "I don't know but I ought to have a receipt;" that Holbrook replied: "The execution and all the papers show, and these witnesses all know, you have paid the money, and there is no need of a receipt," to which Fifield responded, "perhaps it is well enough;" that the witness did not see the money paid, and did not know how much was paid.

After this testimony was given, the counsel for the defendants objected to it, on the ground that it was of admissions and sayings of Holbrook after the fact of the payment of the money, and therefore, if he was acting as agent of the defendants, not competent to affect or bind them, which objection was overruled by the court, and the evidence submitted to the jury under instructions hereinafter set forth.

The plaintiff also gave evidence tending to show that Holbrook had authority from, and acted as the agent and in behalf of, the defendants, in getting back the money from the plaintiff, by reason of the illegality of the execution.

It appeared from a duly certified copy of the execution in question, that it was made returnable in sixty days.

The defendants' evidence tended to show that after the sale of the property on said execution in 1848, they were informed there was a balance in the hands of the officer, or of Fifield, to the

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amount of between forty and fifty dollars ; that they sold the claim for the same to Holbrook ; that Holbrook commenced a suit in trespass which was settled by Holbrook as their agent, and that the receipts passed as before stated ; that afterwards, on the first day of August, 1859, G. W. Richardson deeded to Holbrook his farm in full settlement of all claims between them ; that after this settlement the defendants never gave any authority to Holbrook to collect anything from Fifield, and that they never knew there was an illegal execution, or that any money had ever been collected on the same, and that Holbrook had never accounted to them for any money so received of the plaintiff.

On the issue joined to the court on the plea of *nil tiel record*, the court found there was such a record and rendered judgment accordingly, to which there was no exception.

The defendants' counsel requested the court to charge the jury :

1. That the debt being satisfied of record, debt on judgment could not be sustained ; that the proceedings must be by some process to correct the record.

2. That the fact that execution was made returnable in sixty days did not render the sale absolutely void ; that it was a good payment of the debt until vacated by the defendant, and that acquiescence in the sale for more than six years made it a valid payment.

3. That the settlement of June 18, 1849, amounted to an accord and satisfaction of the debt, and was a payment of the same by the agreement of all parties, and no party to that settlement could vacate the same, though the execution was returnable in sixty days.

4. That the settlement of June 18, 1849, was a final settlement of the execution, and the defendants could not afterwards compel a repayment, and if the plaintiff repaid the money to them or to Holbrook as their agent, it was a voluntary payment, and could not be recovered back.

5. That if the jury should find that the defendants sold to Holbrook all claims and rights of suit against the plaintiff, in the fall of 1848, they having no knowledge of any defect in the

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execution; and in pursuance of that authority, Holbrook commenced the suit in trespass, and made the settlement of June 18, 1849, and on the first of August following the defendants and Holbrook made the settlement, and the defendant, G. W. Richardson, deeded his premises to Holbrook in settlement, then Holbrook's authority ceased, unless the jury should find that the defendants gave new authority to Holbrook to collect back the money.

6. That the settlement of June 18, 1849, operated as a discharge of the judgment, and that if the jury should find that Holbrook afterwards, with the knowledge and consent of the defendants, demanded the money on said execution, and that the plaintiff yielded to the demand, it would not have the effect to revive the judgment, so that the action of debt could be sustained thereon, but that if any action could be sustained it must be assumpsit to recover back the money.

The court declined to charge as requested, but, among other things not excepted to, charged in substance, that the execution of the plaintiff against the defendants was void by reason of being made returnable in sixty instead of one hundred and twenty days; that the officer's return upon it did not operate as a satisfaction of record, such as would preclude the right of an action of debt on said judgment; that though this execution was of no effect of its own vigor as a legal process, still, as the plaintiff under it received the money in satisfaction of his judgment it was competent for the parties to assent to and treat the receipt of the money as such satisfaction; that it was agreed on both sides, that in the adjustment of June 18, 1849, it was so treated as evidenced by the plaintiff's receipt to the defendants of that date, and that if the defendants have permitted the money to remain in the plaintiff's hands as such satisfaction, the plaintiff cannot recover; but that, if the defendants, by themselves or by their agent duly authorized in that behalf, have claimed of the plaintiff that he had no right to the money for the reason that his execution was illegal, and have insisted on his paying it back, and the plaintiff has yielded to said claim and paid back the money in pursuance and by reason of it,—in other words, if the defendants, on the ground that the plaintiff's execution was

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illegal and gave him no right to take and hold the money in satisfaction of his judgment, have insisted upon undoing the adjustment of June 18, 1849, and have repudiated it as operating as a satisfaction of the plaintiff's judgment and have claimed the money back, and by reason of such repudiation and claim, have recovered back the money,—the plaintiff's judgment should be regarded as being unsatisfied; that if it was thus claimed and recovered back by Holbrook as the agent of the defendants, by their authority and in their behalf, it was of the same effect as if done by themselves; but if Holbrook made claim that the money should be paid to him by the plaintiff on the ground of a right to it by reason of his having attached the property subsequently to the plaintiff out of which the money had been realized, and it was in pursuance and by reason of that claim that the plaintiff paid over the money to Holbrook, the defendant would not be affected by it, and the plaintiff's judgment should still be regarded as satisfied by the money he was holding for that purpose by the assent of the defendants; that, in order to entitle the plaintiff to recover, the jury must be satisfied from the evidence that the money had been withdrawn from the plaintiff by the authorization, with the assent, and in behalf of the defendants, in repudiation and denial of the plaintiff's right to hold it in satisfaction of his judgment.

As to the testimony of Hancock, the court charged the jury that the sayings and admissions of an agent in connection with, and as part of, the execution of the business of his agency, are evidence by which his principal may be affected; but what such agent may say as to past transactions in the execution of his agency, are not entitled to be treated and regarded as evidence of such transaction, as against his principal; that in the present instance, if the jury should find that when Hancock went into the store the transaction going on between the plaintiff and Holbrook was then still in progress, and the plaintiff was, as the consummation of the business, requiring Holbrook to give him a receipt, then, what was passing between the parties by way of requiring a receipt and the calling of witnesses to what the transaction was, as a substitute and reason for not giving a receipt, must be regarded as part of the *res gesta*, and the testimony of Hancock as to what was thus being transacted between

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the plaintiff and Holbrook was proper to be considered upon the question, whether, in point of fact, the money was paid over by the plaintiff to Holbrook, in case from the other evidence the jury should find that Holbrook was the agent of the defendants and acted under their authority and in their behalf, for the purpose of obtaining from the plaintiff the money he had received and was holding under his execution against the defendants,—otherwise, they would lay his testimony out of the case.

To the neglect of the court to charge as requested, and to the portions of the charge above set forth, the defendants excepted. Verdict for the plaintiff for the amount of the judgment declared upon.

J. A. Wing, for the defendants.

Peck & Colby, for the plaintiff.

ALDIS, J. The first question raised in this case is, whether an execution issued for sixty days, when its should have been for one hundred and twenty days, is void.

After the elaborate argument which was made in *Bond v. Wilder*, 16 Vt. 393, and the brief and positive reaffirmance in that case of our old decisions that it is void, “we shall not now suffer that point to be stirred.”

The execution being void, the return of the officer upon it, that the judgment was satisfied, is void also; and the judgment for all that was done under that execution stands in full force, precisely as it did before the execution was issued and the void proceedings had under it.

The first two requests to charge were therefore erroneous, and the charge in this respect was right.

The third request of the defendants, that the jury should be told that the settlement of the 18th of June, 1849, operated by the agreement of the parties to make the receipt of the money by the plaintiff on the execution a satisfaction and payment of the judgment, was complied with by the court. If nothing further had appeared in the case, the plaintiff must have failed in his suit.

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The next request, that the subsequent payment of the money back to the defendant's agent by the plaintiff, was a voluntary payment so that the judgment can not be enforced,—is clearly untenable. The defendants, through Holbrook as their agent, wholly repudiated the settlement of June 18th, and claimed the repayment of the money, and threatened to bring a suit to collect it. The plaintiff yielded to their claim rather than have a lawsuit upon that point. By mutual agreement that settlement was unsettled, or rather was treated as if it had never been,—the money was paid back not upon the ground that the judgment was extinguished,—but in reality upon exactly the opposite ground that the plaintiff could not hold the money either by virtue of the execution, or by virtue of payment and satisfaction in the settlement; but that the money belonged to the defendants. Receiving the money upon this ground, the defendants must be bound by the necessary legal results of their position, viz:—that if the money has never been applied either through the execution or the settlement, so as to belong to the plaintiff, then the judgment has never been satisfied, but has always remained in force.

It is claimed now that the judgment was extinguished by the settlement, and that if the plaintiff and defendants afterwards agreed to have the money paid back to the defendants upon the basis that it was not so extinguished, such acts of the parties would not revive the judgment, but would give the plaintiff the right to recover back the money in an action of assumpsit. But how could the plaintiff recover back this money upon any such implied promise, when the understanding upon which he repays it is, that it is not his money, but belongs to the defendants, and is paid to them with full knowledge on both sides of all the facts, and upon claim made by defendants and conceded by the plaintiff, that the plaintiff had acquired no right to retain it either by the execution or the settlement? The nature of the transaction precludes any such recovery; and unless the judgment is held to have been kept alive and to be now in force, the plaintiff is remediless, whilst the defendants keep their money and yet pay their debts.

The acts and claims of the defendants, by which they obtained

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the money, estop them from now setting up either the execution or the settlement to the prejudice of the plaintiff. They have induced the plaintiff to act upon the basis of their claims. They must thereby be estopped from denying the facts upon which they induced the plaintiff to act, and must be bound by the necessary consequences resulting from the existence of such facts.

In regard to the agency of Holbrook, and that the money must have been paid to him not on account of his attachment, but as agent of the defendants and upon their claim, the charge of the court was in compliance with the defendant's request.

But one question remains,—the admissibility of Hancock's testimony. He did not see the money paid by the plaintiff to Holbrook, but immediately after its payment he came into the room, heard both parties say that it had been paid—heard the plaintiff demand a receipt to be preserved as a voucher, heard Holbrook decline giving one on the ground that it was not necessary, and that the persons who were present (of whom Hancock was one,) were all witnesses to the fact that he had paid the money, and heard the plaintiff assent to the suggestion as "well enough." The transaction could not be considered as ended so long as on the occasion of the payment and before the parties had separated anything according to the usual course of business remained to be done in regard to it. The giving of a receipt on the payment of money, or on the settlement of a claim, is according to the usual course of business. It was a voucher which the plaintiff had a right to demand and which the agent of the defendants ought to have given. Until it was given, or waived by the plaintiff, the transaction was not finished. When Holbrook proposed to refer to the persons then present as witnesses, whose recollection should stand in lieu of the receipt, and Fifield assented, then, and not till then, was the transaction ended. The evidence was clearly admissible, and the charge of the court was at least as favorable to the defendants as they could claim.

Judgment affirmed.

C A S E S
ARGUED AND DETERMINED
IN THE
SUPREME COURT
OF THE
STATE OF VERMONT,
FOR THE
COUNTY OF WASHINGTON,
AT THE
AUGUST TERM, 1861.

PRESENT:

HON. ASA O. ALDIS,	}	ASSISTANT JUDGES.
HON. JOHN PIERPOINT,		
HON. LOYAL C. KELLOGG,		
HON. ASAHIEL PECK,		

THE STATE OF VERMONT v. JOSEPH BRADISH.

Action. State. State's Attorney.

The superintendent, appointed under the act "to provide for rebuilding the State House," approved February 27th, 1857, (see Laws of 1857 p. 171,) purchased, for and in the name of the State, certain tools to be used in such work; and while such tools were on the land of the State adjacent to the

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State House, and in use upon such work under the direction of the superintendent, they were attached by the defendant as the property of their former owner. In an action of trespass *qu. cl. fr.*, and for taking these tools commenced in the name of the state solely by direction of the superintendent, and prosecuted, ~~not~~ by the State's Attorney, but by counsel employed by the superintendent, *held*, that the action was properly brought in the name of the state, and by proper authority, and that the defendant could not take advantage of the objection that it was not prosecuted by the State's Attorney.

When there is no statutory provision to the contrary, actions in behalf of the state, or for its benefit, are to be brought in the name of the state whenever, upon common law principles, the legal interest in the subject matter is in the state.

TRESPASS *qu. cl. fr.*, and for carrying away a quantity of tools and implements, the property of the State of Vermont.

Plea not guilty, with notice of justification of the alleged trespass.

Evidence was given in behalf of the state tending to prove title in the state to the *locus in quo*, and that thereon in the spring of 1857 the work of cutting stone for the rebuilding of the State House was commenced and carried through the years 1857, 1858, and into 1859, and that thereon was a temporary blacksmith shop, used for the purpose of repairing and making the tools that were needed about such work of stone cutting; that the cutting of a great part of the stone for the State House was let to one Heustis in May, 1857, by Thomas E. Powers, the superintendent appointed by the Governor under and in pursuance of the act of the Legislature passed at the extra session in February, 1857; (*See Acts of 1857, p. 171*;) that Heustis entered upon such work early in the next June, and provided himself with the necessary tools and implements and workmen; that about the middle of July, 1857, Heustis, having become convinced that he had undertaken a losing business, by an arrangement with the superintendent gave up his contract and his tools and workmen to the state; that Heustis was paid for his tools and implements agreeably to such arrangement, and that they were thenceforward used by the workmen engaged in the stone cutting, who were, after the contract was thus given up by Heustis, working under the employment and on the responsibility of the

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state ; that on the 26th of October, 1857, these tools and implements being in said blacksmith shop, the defendant as deputy sheriff, by virtue of a writ of attachment in favor of Levi Boutwell, against Heustis, professed to attach them, and to that intent locked up the shop and carried away the key with him.

It was conceded in behalf of the plaintiff by the counsel, and was testified to by Powers, that this suit was instituted by the sole direction of Powers, acting only in virtue of his authority as such superintendent, and that the attorneys and counsel in behalf of the state appeared and acted as such under the sole employment of Powers as such superintendent, and that the state's attorney of Washington County was in no way connected with the suit.

The defendant's counsel made the point and claimed that the suit was brought without authority, and that there was no warrant of law for instituting or prosecuting it, and moved the court to so rule.

The court, BARRETT, J., presiding, at the March Term, 1860, declined to entertain the motion, but decided *pro forma*, that as issue had been joined upon the plea of not guilty, with notice of justification, and as the state appeared by lawful and responsible attorneys of the court, the issue must be submitted to the jury upon the evidence under proper instructions as to the law of the action.

To this decision the defendant excepted.

The jury rendered a verdict for the plaintiff, after which the defendant filed a motion in arrest of judgment for the insufficiency of the Declaration.

The court *pro forma* overruled this motion, to which the defendant excepted.

Peck & Colby, for the defendants.

T. P. Redfield, for the plaintiff.

PECK, J. This is an action of trespass on the freehold and for carrying away certain articles of personal property alleged

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to be the property of the plaintiff. The action is brought in the name of the State of Vermont.

It is insisted by the defendant's counsel that the action is improperly brought in the name of the state of Vermont and that it cannot be sustained in that name. It does not appear by the exceptions that any such question was raised in the trial below, but the case shows that the defendant after verdict for the plaintiff moved in arrest of judgment, which motion was overruled, to which decision the defendant excepted. Under this exception the defendant can raise the question here whether upon the face of the declaration this action can be maintained in the name of the state of Vermont. If it can not, there was error in overruling the motion. The existence of the state and its capacity to maintain suits being of a public character, the court will take judicial notice whether by law it can maintain this suit in the name of the state. It is provided in the constitution, as well as by statute, that criminal prosecutions shall be in the name of the state, but the constitution is silent as to the mode of prosecuting civil suits in behalf of the state, or suits in which the state is the real plaintiff or interested. Hence in the absence of legal regulations to the contrary the common principle applicable to other parties must apply, that is, the suit must be in the name of the person or party, whether natural or corporate and artificial, having the legal interest. There is no statute prohibiting the state from bringing suits in its own name, and no statute providing that all actions by the state shall be commenced and prosecuted in any other name. There are numerous provisions in the statutes for bringing certain suits in the name of particular officers of the state, such as the state treasurer and some other officers. In relation to actions coming within such provisions probably the statute must be followed, but beyond this no prohibition against prosecuting suits in the name of the state of Vermont can be implied. On the contrary it is evident from the statutes on this subject that there are civil suits which may be brought, as this is, in the name of the state. Chap. 9, sec. 50, Comp. Stat. p. 84 expressly provides that in case of default of a state's attorney the auditor of accounts shall cause a suit to be brought against him "*in the name of the*

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state of Vermont." In chapter 42 Comp. Stat., sec. 6, p. 298, entitled "Forteiture of grants," which includes grants of land by the state, it is provided that the proceedings shall be by writ of *scire facias* "*in the name of the state.*" In ch. 61, sec. 21, p. 380, entitled "The limitation of real and personal actions and rights of entry," it is provided that the limitations therein prescribed shall apply to the same actions when brought in the name of the state, or in the name of any officer, or otherwise, for the benefit of the state, in the same manner as to actions brought by citizens. There must be numerous instances where the state would have occasion to bring suits where no provision is made for bringing them in the name of any officer of the state; and unless in such cases the state can maintain actions in its own name the legislation on this subject is very defective. It is evident both upon common law principles and upon inference from the legislation on this subject, that where there is no statutory provision to the contrary, actions by the state or for the benefit of the state are to be brought in the name of the state, in cases where, upon common law principles, the legal interest in the subject matter is in the state. This action is therefore properly brought in the name of the state unless it can be shown that there is some statute providing that it shall be brought in some other name.

It is claimed that the cause of action in this case comes within chap. 6 of the Comp. Stat. relating to the seat of government and public buildings, and that the suit should have been in the name of the state treasurer as therein provided. But assuming that the action there given *upon the statute* in favor of the state treasurer for damage done to the public buildings, furniture or appurtenances, takes away the common law remedy, (which it is unnecessary to decide,) it is a fatal answer to this objection that it was not raised on trial in the county court, as the motion in arrest reaches no defect or error except what is apparent on the writ or declaration, and it does not appear from the writ or declaration that the trespass was committed upon the state house, its furniture, or appurtenances or appendages, but for aught that appears it may have been upon other property situated

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elsewhere and wholly distinct from any property mentioned in that act.

But on the facts disclosed on trial as shown by the exceptions the result is the same even if we could resort to the exceptions for aid in sustaining the motion. It there appears that the personal property in question, consisting mainly of tools for cutting stone for rebuilding the state house, under the act of 1857, was when taken by the defendant, in a temporary blacksmith shop on the *locus in quo*, and in the use of men in the employment of the state in the construction of the state house, under the charge and direction of Thomas E Powers as superintendent, under the appointment of the Governor in pursuance of said act. It appears that the superintendent had purchased this property for the state for that purpose. From the nature of this personal property and the use for which it was purchased and to which it was applied, in connection with the character of the agency of Powers as such superintendent, it is obvious that this property was under the control of Powers and not within the scope of the act relating to the duties of the sergeant-at-arms; and consequently the trespass complained of does not come within the seventh section of that act, requiring the sergeant-at-arms to bring an action in the name of the state treasurer. The action, therefore, was properly instituted in the name of the state.

It is claimed by the defendant's counsel that Powers had no right to purchase this property for and in behalf of the state, but we think otherwise. But whether he had authority or not, it was a question pertaining to the plaintiff's title, and could arise only on the trial of the merits of the case, and not having been raised in the county court it can not be raised here.

The case shows that the defendant on trial before the jury moved to dismiss the action on the alleged ground that the suit was commenced and prosecuted without authority. As the case is one, as we have already seen, that does not come within the statute relating to the duties of the sergeant-at-arms, we think Powers, as such superintendent, had authority to institute the suit, and that the counsel had authority to prosecute it under

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his employment and direction. But if this were not so, it is doubtful whether the defendant has the right to raise this question, especially as Powers was the agent of the state, acting in behalf of the state, under color of authority. The judgment in this action will be a protection to the defendant against another suit for the same cause of action, even if the counsel who presented it in behalf of the plaintiff acted without authority. *St. Albans v. Bush*, 4 Vt. 58. Notwithstanding the general provision of the statute making it the duty of state's attorneys to commence and prosecute suits in which the state is interested, still in many cases such suits are directed by some other officer. When such other officer has the authority to cause such suit to be commenced he may be justified under certain emergencies in applying to some attorney, other than the state's attorney, for that purpose. Whether he acts judiciously in doing so in a given case, or whether the circumstances of the particular case warrant him in employing counsel other than the state's attorney is a question between him and the state, and not a question the defendant can raise on trial. Had the state's attorney come into court and claimed the right to control the suit in defiance of the authority of Powers and the counsel he employed, the court might then have been called on to pass upon the question as to which had the paramount authority, but in the absence of the assertion of any such right the question does not properly arise. The defendant can not, as a matter of right, require the court to dismiss the suit or arrest its progress, unless he can show that the suit was commenced and prosecuted by a stranger, without the authority or consent of the plaintiff, and in fraud of the plaintiff's rights, or that the defendant's rights are endangered or prejudiced beyond what they would be if the suit were prosecuted by proper authority and through the right agency. Nothing of this kind appears in the case. There was no ground for dismissing the action, and the motion was properly overruled.

The judgment of the county court is affirmed.

Ladd v. The Town of Waterbury.

JOHN S. LADD v. THE TOWN OF WATERBURY.

Towns. Highways. Highway Surveyor.

If the selectmen of a town describe, in the tax bill given by them to a highway surveyor, as within his district, a highway, which, though never legally established as a highway, has been recognized and repaired as such by the town, and used by the public, and the surveyor proceed to repair such highway, and, in consequence of its never having been legally established, is obliged to pay damages in trespass to a land owner for working the same, he is entitled to be indemnified by the town for such damages.

A highway surveyor is not obliged to look beyond his tax bill and warrant to ascertain the extent of his district and the roads which he is to repair.

ASSUMPSIT. The facts in the case and the charge of the county court to the jury, so far as it was excepted to by the defendant, are sufficiently set forth in the opinion of the court.

Timothy P. Redfield, for the defendant.

Dillingham & Durant, for the plaintiff.

ALDIS, J. The plaintiff was a highway surveyor in Waterbury. The selectmen gave him a tax bill and warrant for his highway district, and therein described the road upon which his tax bill was to be worked out as follows: "Beginning at the school house on Demerett's land at the junction of the roads, thence to John S. Ladd's house." This was the only road in his district. A part of it crossed the land of one Rowell, who denied that it was a legal highway, and objected to the plaintiff's working out the tax on it upon his land. The selectmen were notified of the objection by Rowell, but (upon the charge of the Court as excepted to we must understand,) they directed the plaintiff to go on under the authority of his bill and warrant, and repair the road. He did so, acting in good faith and with reasonable care and prudence. Rowell sued him for trespass in so doing, and recovered damages. The plaintiff now sues the town to recover for the damages which he was obliged to pay Rowell, upon the ground that the town is bound in law to indemnify him for what he did upon Rowell's land. No question arises but that the plaintiff in what he did upon Rowell's land acted in good faith and in

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a proper manner in collecting and laying out the tax; and in regard to all such questions (some of which were alluded to in argument) it would appear that the court charged as requested by the defendant, and no exception was taken.

The question therefore arises, is the plaintiff, as collector of the highway taxes, entitled to indemnity as against the town for the damages he has been obliged to pay Rowell. The plaintiff claims this—first by force of the 50th section of chapter 81, of the compiled statutes; Comp. Stat. p. 471.

The statute provides that “every collector shall be fully indemnified by the town, village, district, or other community by which he shall be appointed, for all damage to which he may be subjected, by reason of any illegality or informality in the tax bill, warrant or other precept, furnished said collector for the collection of the tax, and all such damage may be recorded by the collector of such town, district,” &c. A highway surveyor is a collector of taxes. The highway tax may be paid in labor if the tax payer choose to pay it in that way; hence the collector must, if required, collect it by having it worked out on the road, and cannot collect it in any other way. To collect the tax therefore, he must work on the road.

He is responsible to the town for any damages which may be sustained by the town through fault or neglect in the discharge of his duty. Comp. Stat. 175 sec. 4.

The road here in question was a public highway, used for public travel, and which, whether originally laid out legally or not, had been adopted by the town, recognized as one they were bound to repair, and one which they had repaired. A traveller suffering damage from its insufficiency could recover therefor of the town; *Blodyett v. Royalton*, 14 Vt. 288:—and doubtless if the surveyor had taxes enough to repair it, and through his own fault neglected to do so and caused the damage, he would be liable to the town.

It is said that he should go to the town records and ascertain whether the highway is legally laid out or not; and if not then not work on it. But this is clearly unreasonable. All highways do not appear of record. They may be established by dedication, use and adoption by the town, and nothing appear of

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record. Of those originally laid out by authority and surveyed and recorded, the records are not always preserved, and if recorded are often so imperfect, that only one skilled in the law can tell whether the highway is legal or not. It is enough for the surveyor that the road is actually open and used for public travel, and is recognized by the town as one; it is liable to repair by being set in his tax bill for him to work upon. It is the duty of the town to see that all highways laid out by authority under the statutes are properly surveyed and recorded. Comp. Stat. p. 162 secs. 8 and 9; p. 163, secs. 13 and 14. But the surveyor cannot regulate the matter, or tell whether such surveys and records are complete or not.

Again the selectmen (who for this purpose represent the town) are authorized to establish and alter highway districts from time to time as they see fit. Their division of the town into highway districts is not required to be recorded, and ordinarily only appears upon the tax bills and warrants which they deliver to the surveyors. Comp. Stat. p. 175, secs. 4 and 5 and 6. The surveyor cannot look beyond his tax bill and warrant, to ascertain the extent of his district, and the roads which he is to repair.

From these considerations it is obvious that his tax bill and warrant should contain a description of the roads upon which he is to apply his taxes, and for which he is responsible by law, and are to be his guide as to his duty and the extent of his responsibility. If they direct him to work out his tax upon a certain road, and the road is used as a public highway, he cannot safely disregard the precept and set up his own judgment against the authority of the selectmen. If there be illegality in the directions contained in his tax bill, the town must indemnify him for any damage he may sustain in obeying the precept.

We think the case at bar clearly comes within the provisions of the statute, and that there was no error in the charge of the court.

This makes it unnecessary for us to consider the other question whether the town would be liable independent of the statute.

Judgment affirmed.

Putnam v. Town.

HIRAM PUTNAM, *Administrator of the Estate of LAURA PUTNAM*
v. JASON W. TOWN, *Executor of JABEZ TOWN.*

Parent and Child. Contract. Evidence.

Where the relation of a parent and child exists, and the child, after coming of age, and while in the parent's family, renders services and receives support, the law will not imply from such relation and the rendering of such service that there was a contract, either that the services of the child or the support furnished by the parent should be paid for. There must be proof either of express agreement for pay, or of such facts and circumstances as satisfactorily and fairly show that both parties at the time expected and understood that the services were to be paid for.

But such proof is established by a fair preponderance of the evidence. It is not necessary that the proof in support of the claim for payment for such services should be full, unequivocal and conclusive.

The entry, after the rendition of such services, by the parent upon an account book of his opinion that his daughter was not entitled to be paid therefor, on the ground that she had been already fully paid, is not admissible in evidence in favor of his estate against the daughter's claim made after his death.

APPEAL from the decision of commissioners upon claims against the estate of Jabez Town. The plaintiff's claim was for services rendered to the testator, Jabez Town, by his daughter, Laura Putnam, the plaintiff's intestate, after she became of age, and while she remained a member of her father's family. The plaintiff introduced evidence tending to prove an agreement by Jabez Town that the plaintiff's intestate should be paid for such services out of his estate after his death, and the defendant introduced testimony tending to show that there was neither any express agreement by the father nor any understanding between him and his daughter, that she was to be paid for such services.

The charge of the county court to the jury relative to the plaintiff's claim, is sufficiently recited in the opinion of the court.

To this charge the defendant excepted.

The defendant offered in evidence on trial a book in the hand writing of Jabez Town, containing charges for articles to the plaintiff's intestate, and another daughter, and to one of his sons, as outfits, and on which was the following memorandum relative to the plaintiff's intestate, in his hand writing: "Laura lived here after she was eighteen years old until she was married.

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She worked for herself a good deal and I got her a good many clothes, and I gave her a great many things. So she got well paid for all she worked for me, besides what I have charged to her."

To the admission of this book as evidence, the plaintiff objected and the court excluded it, to which the defendant excepted.

O. H. Smith and *T. P. Redfield*, for the defendant.

Peck & Colby, for the plaintiff.

ALDIS, J. The court charged the jury that the burden was on the plaintiff to satisfy them by a fair preponderance of evidence, that there was a contract or mutual understanding between said Laura and her father, in pursuance of which she rendered the services, and was to be paid for them in addition to the support she received while remaining in his family: also that as the services were rendered by Laura while continuing to reside in her father's family after she was of age, and while receiving her support, and without account or charge between her and her father, no promise to pay for such services could be *implied* from such relation between them, but the promise must be found from evidence tending to show an express promise or mutual understanding of the parties that the services should be paid for.

It is claimed by the defendant that in cases of this kind, it is not enough that there should be a fair preponderance of the evidence to sustain the claim,—but that the proof should be full and plenary, unequivocal and conclusive.

Suits of this character are not unfrequently brought after the death of the parent;—often a considerable period of time has elapsed after the services were rendered, and before the claim is made. No accounts have been kept between the parties. These circumstances have led the courts to regard such claims with suspicion. Hence it has sometimes been said when such suspicious cases have pressed hard upon the court, that such claims ought to be proved by unequivocal acts, and not by loose and idle declarations. 5 Watts & Serg. 515. But we do not understand that the courts of this State have altered or intended to alter the rule

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of the common law—that a fair balance of proof—a fair preponderance of the evidence for the plaintiff, will enable him to sustain his case. On the contrary in the very recent case of *Davis v. Goodenow*, 27 Vt. 715, Judge REDFIELD in referring to the case in *5 Watts & Serg.*, says that that case seems to require more than the amount of proof usually required. That case (*Davis v. Goodenow*) was recommitted to the auditor that he might report whether it was *satisfactorily shown* to him, that the parties expected at the time the services were rendered, that the plaintiff should have wages; but no instruction was given that the ordinary rule as to the amount of proof required to satisfy him should be departed from.

The cases of *The Adm. of Way, Jr. v. The Estate of Way*, 27 Vt. 627, of *Andrus et ux. v. Foster*, 17 Vt. 560, and of *Fitch v. Peckham's Ex'r.*, 16 Vt. 150, all evidently stand upon that principle. These cases have established the important principle that where the relation of parent and child exists, and the child after coming of age, and while in the parent's family, renders services and receives support, the law will not imply from such relation and the rendering of such service, that there was a contract either that the services of the child or the support furnished by the parent, should be paid for. In ordinary cases, when the relation of parent and child or one similar to it did not exist, the law would imply that such service was to be paid for; but where such relation exists the law presumes the service to be rendered, and the support to be furnished voluntarily and without any expectation of payment by either party. Hence in such cases there must be proof, either of express agreement for pay, or of such facts and circumstances as satisfactorily and fairly show that both parties at the time expected and understood that the services were to be paid for. If the evidence tend to show this, then it is for the auditor or the jury to say, whether it does show it. In the case at bar, we think the evidence legally, though perhaps slightly, tended to show a contract. The charge of the court adopted the settled rule of law applicable to such cases. We find no error in the charge:—if there was error in the verdict of the jury it is not for us to correct it.

The book was offered by the defendant not, as we understand

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the case, to prove that the articles delivered as the plaintiff's outfit, were received by her and should apply in extinguishment of her account. The defendant did not put his defence on any such ground. Upon that basis the entry of the articles on the book might well have been deemed a proper book account, and so admissible in evidence. But as we understand the exceptions, the book was offered that the entry by the deceased father upon another page following the one on which the account was charged, viz: that "Laura lived here after she was eighteen years old till she was married. She worked for herself a good deal and I got her a good many clothes, and I gave her a great many things, so she got well paid for all she worked for me, besides what I have charged to her,"—might be admitted as evidence. Clearly this was no account entered upon book in the usual way of articles delivered, or money paid, or of any proper item of book charge. It was a private entry, made, not in the usual course of business, but long after the transactions to which it referred had happened, of the opinion of the deceased as to whether his daughter was entitled to compensation for her services. Such declarations, if made by him verbally in his lifetime, could not have been proved on the trial. They would have been held mere hearsay. It gives them no greater force that he saw fit to write them as a memorandum in his book.

The entry cannot be considered as a charge in gross, as in the case of *Newell v. The Ex'rs. of Keith*, 11 Vt. 214.

Nor is it a memorandum against the interest of the party making it—on the contrary it is only a general statement intended to promote the interest of the party making it by denying that the plaintiff's intestate had any just debt against him.

We are not aware of any principle of law which would justify the admission of the memorandum.

Judgment affirmed.

Hutchins et al. v. Moody.

LEANDER HUTCHINS *et al.* v. GEORGE W. MOODY.*Taxes. Covenant against incumbrances. Non-resident proprietors.*

Taxes become a fixed incumbrance upon the land upon which they are assessed as soon as the officer, having their collection in charge, proceeds officially so far as to manifest his intention to pursue the land for the purpose of enforcing the collection of the taxes.

In the case of a non-resident proprietor, taxes become an incumbrance upon the land when the constable has, in accordance with sec. 24, chap. 81, of the Compiled Statutes, made a list of the land and the taxes assessed thereon, and deposited the same in the town clerk's office for record.

The land of H. then a resident of Vermont, was set in his grand list, after which he removed from this state, as it was generally supposed, to remain permanently absent, and left no personal property here: *Held*, that notwithstanding his return, in a short time afterwards, to another part of the state, the constable, having charge of the collection of the taxes assessed against him on such list, was justified in treating him as a "non-resident proprietor," and proceeding accordingly in the sale of the land for the taxes, provided he was not aware of the return of H. to the state, and the circumstances were not such as reasonably to put him on inquiry respecting such return.

This was an action of covenant broken. The declaration alleged that the defendant, on the 12th of May, 1853, conveyed to the plaintiffs a certain piece of land in Waterbury, and in his deed covenanted that the premises were free from all incumbrances; that Oramel Howe was the owner of the land on the 1st of April, 1853, at which time it was set to him in the grand list of that town; that certain school, town and state taxes were assessed against Howe on the land in question, as set in the list of 1853, in that year and after the 1st of April; that Howe neglected and refused to pay these taxes, and that the constable of Waterbury sold the land at public vendue for the payment thereof; and that the plaintiffs were compelled to pay a large sum of money for the redemption of the land after such sale.

The defendant pleaded that he had not broken his covenant, and the cause was tried by the court, at the March term, 1860, BARRETT, J., presiding.

The plaintiffs read in evidence the deed from the defendant to them, which was as set forth in the declaration. It was con-

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ceded by the defendant that Oramel Howe held the title to, and was in possession of, the property described in said deed, on the first day of April, 1853, and that the same was lawfully set to Howe in the list of that year.

The plaintiffs also proved the regular assessment against Howe of the several taxes described in the declaration, on his grand list for 1853, and the due delivery of the tax bill containing the town, state and state school taxes in question, to one Brown, the first constable of Waterbury for the years 1853, 1854 and 1855, for collection. The school district taxes described in the declaration were regularly assessed against Howe in 1853, and the rate bills were handed by the district collector to Brown for collection in July, 1854, but the collector did not deposit with the constable, Brown, any list of the land upon which such taxes remained unpaid together with the amount of tax due thereon, as required by sec. 24, chap. 81, p. 466, Compiled Statutes.

It was proved that Howe conveyed the premises in question, on the 22d of April, 1853, to one Wells, and thereupon broke up housekeeping and went with his family to Pennsylvania, and remained there till the December following, when he returned to Berkshire, in this state, where he remained till April, 1856; that he left no personal property in Waterbury, and had none in the state after his removal from Waterbury; that the constable, Brown, after Howe went to Pennsylvania, had no knowledge of his return to Vermont, but supposed that he had permanently left the state; and it did not appear that any person in Waterbury, except Mr. Dillingham, one of the defendant's counsel, knew that Howe had returned from Pennsylvania, and was in Berkshire, as above stated.

The plaintiffs also introduced in evidence the following copy of a record in the town clerk's office in Waterbury, viz:

“NOTICE.—Sale of non-residents' lands for taxes. The non-resident proprietors of the town of Waterbury, in the county of Washington, are hereby notified that the taxes assessed by the general assembly of the state of Vermont, by the said town of Waterbury, and by school district No. one in said Waterbury, on the grand lists of 1851 to 1855 inclusive, remain either in whole

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or in part unpaid on the following described lands in said town, to wit:”

(Then followed a description of the land in question, together with certain other pieces of land on which the taxes remained unpaid, and the record proceeded thus:)

“And so much of said lands will be sold at public auction at the dwelling house of C. C. Parker, in Waterbury village, on Wednesday the 17th of October next, at nine o'clock in the forenoon, as shall be requisite to discharge said taxes with costs, unless previously paid.

Waterbury, September 6th, 1855.

L. C. BROWN, 1st Constable.”

“List of Oramel Howe's taxes in Waterbury, District No. 1.

On grand list of 1853,.....	11 88
State tax on grand list of 1853,.....	1 52
State school tax,....	48
Town,.....	2 38

\$16 26”

(Then followed a list of the other delinquent taxes.)

“I hereby certify that the above is a true list of taxes now due on tax bills in my hands, the first of August last.

Attest,

I. C. BROWN, 1st Constable.”

“September 6, 1855, at noon, received and recorded this instrument.

JNO. D. SMITH, Town Clerk.”

“I hereby certify that the within notice was published in the *Green Mountain Freeman*, a paper printed at Montpelier, in the same county where the premises within described lie, for three weeks, in accordance with the law to that effect.

Attest,

JNO. D. SMITH,

Town Clerk of Waterbury.

Waterbury, October 19, 1855.”

The plaintiffs further proved that in pursuance of the notice above recited, Brown sold the premises in question, and that one Stimpson, one of the plaintiffs, bid them off for the amount of the taxes due thereon and the costs of the notice, sale, etc. The record of such sale was also proved, as was likewise the fact of

Stat. Vt. makes it a lien from Apr 1.
in express words. -

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the advertisement of the constable's notice of sale in the *Green Mountain Freeman*.

Upon these facts the county court rendered judgment for the defendant, to which the plaintiffs excepted.

O. H. Smith and T. P. Redfield, for the plaintiffs.

Dillingham & Durant, for the defendant.

(*KELLOGG, J.* When this case was before this court on a former occasion, (30 Vt. 655,) it was held that the fact that real estate was set in the grand list, on the first day of April preceeding its conveyance to its then owner, and that taxes were voted and assessed upon it against him after the conveyance, did not constitute a breach of the covenant against incumbrances in a deed conveying it until such taxes became legally fixed upon it so as to be a definite burden upon the estate which the grantee might properly remove by payment; and that such taxes could not be legally fixed upon the estate until the preliminary remedies against the goods and chattels, or the body, of the person against whom the taxes were assessed had been exhausted; and that when the taxes thus became legally fixed upon the estate, the burden would properly be referred to, and date from, the time of the date of the list.) The lien upon real estate for the taxes assessed thereon is created by the statute, (Comp. Stat. p. 452, secs. 10, 12,) and the question now presented is, whether, on the facts stated in the case, the taxes mentioned in the plaintiffs' declaration became legally fixed upon the land, so as to justify a subsequent owner in treating them as a fixed and definite incumbrance upon it.

It appears that, on the 1st April, 1853, Oramel Howe owned and was in possession of the real estate conveyed by the defendant to the plaintiffs,—the same being situated in the town of Waterbury,—and that it was lawfully set in the list of that town in that year to said Howe; that a state tax, a state school tax, and a town tax were legally voted and assessed on that list; that I. C. Brown was the first constable and collector of taxes of that town during the years 1853, 1854 and 1855, and that

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legal rate bills with the proper warrants for the collection of the said taxes were duly made and delivered to the said Brown as such collector, but not until after the removal of Howe from the state. On the 22d April, 1853, Howe conveyed the premises to William W. Wells, and broke up housekeeping in Waterbury, and with his family went to the state of Pennsylvania, and remained there until December following, when he returned to Berkshire in this state, and there remained until April 1856; that he left no personal property in Waterbury, and had none in this state after his removal from Waterbury; and that the said Brown, after Howe left this state, did not know that he had returned into the state during that time, but supposed that he had left, and continued permanently out of the state; and it did not appear that any person in Waterbury, except Mr. Dillingham, one of the counsel for the defendant, knew that Howe had returned from Pennsylvania into this state, and was in Berkshire, as above stated. On the 6th September, 1855, Brown, the first constable, made and deposited in the town clerk's office for record a statement of the lands of the non-resident proprietors of the town of Waterbury, and of the unpaid taxes thereon, including therein the land conveyed by the defendant to the plaintiffs and the said taxes assessed against Howe thereon, with certain taxes thereon duly voted and assessed by school district No. 1 in that town on the same list,—the said land being situated in that school district,—and advertised the said lands for sale on the 17th October following, for the payment of the said taxes with costs, by publication in a newspaper as required by the statute; and afterwards, at the time and place appointed for the sale, sold the land so conveyed by the defendant to the plaintiffs to Joel G. Stimpson, one of the plaintiffs, for twenty dollars, which sum was the amount of all of said taxes on said land against Howe as above mentioned, with the officer's fees for the collection of the same in the manner aforesaid; and this sum was paid by Stimpson to the constable and duly applied in payment of said taxes and fees.

The plaintiffs' right to recover depends, not upon the fact that the land was sold by the constable, but upon the fact that the incumbrance of the taxes became so fixed upon the estate that they, as subsequent owners, would be justified in removing it by

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payment. To make the lien for taxes a fixed incumbrance upon the land, we consider that it is sufficient that the officer should, by some official act, proceed so far as to indicate or manifest his intention to pursue the land for the purpose of enforcing the collection of the taxes agreeably to the provisions of the statute. When the officer has thus indicated his intention to pursue the land, the owner of the land would be justified in treating the lien for the taxes as a fixed incumbrance, and in discharging it by payment; and though the officer's subsequent proceedings should be wholly irregular and defective, this would not affect the right of the owner of the land to discharge the lien after it became a fixed and definite incumbrance upon the estate. When there is no mode of collecting the tax by a resort to the goods and chattels, or the body of the person to whom the land was assessed in the list, the officer is authorized to enforce the lien of the taxes on the land by selling the land agreeably to the provisions of the statute, but neither the assessing or placing of the property in the list, nor the vote laying a tax on the list, are sufficient, without some further proceeding, to charge the land with the incumbrance of the tax.

The land was properly set in the list to Howe, and the taxes appear to have been legally voted and assessed on the list. Was Howe, at the time when the officer commenced his proceedings for the purpose of selling the land for the payment of the taxes, a "non-resident proprietor" within the meaning of the statute? He had, shortly after the making up of the list, and before any of the tax bills for the collection of the taxes on the list were delivered to the collector, removed to a distant state, and though he subsequently returned, and was in fact within this state at the time of the proceedings of the constable for the collection of the taxes by the sale of the land, yet we find nothing in the case tending to show that the officer holding the tax bills would by the exercise of reasonable diligence have obtained any information in respect to his return. In view of the notoriety in the place of Howe's former residence of the fact of his removal from the state, we think that the constable would be justified in presuming that his residence was without this state, and especially when his change of residence had been so recent, in the absence of any information in respect to his return to the state. A

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return to the state by Howe, and a residence in another town within it, remote from the place of his former residence in it, would not, as we think, entitle him to be treated by the collector of taxes of the town of his previous residence as a resident within the jurisdiction of such collector for the collection of taxes, unless the circumstances of the case were such as to affect the collector with notice or information of such return to the state, so that there would be a reason for making an inquiry in respect to his change of residence.

The constable, therefore, was authorized to enforce the collection of the taxes against Howe by proceeding agreeably to the statute provisions, to sell the land on which the same were assessed as the land of a "non-resident proprietor;" and we regard the act of the constable in making out a list of the lands and of the taxes against Howe thereon, and depositing the same in the town clerk's office for record, as a substantial compliance with those provisions (Comp. Stat. p. 466, sec. 26, *et seq.*) so far as such a compliance was necessary to distinctly manifest his intention to pursue the lien upon the land for the collection of the taxes. This, as we think, was all that was requisite to make the lien for the taxes a fixed and definite incumbrance upon the land. But this lien could not be pursued or made available for any other taxes than those which the constable was authorized to collect; and in respect to the school district taxes assessed against Howe on the same list, it is clear, on the facts found by the court, that there was no such compliance by the school district collectors with the provisions of the statute (Comp Stat., p. 466, sec. 24,) as would lay a foundation for, or justify, any proceedings on the part of the constable for the collection of those taxes. The state school, state, and town taxes stand on a different footing, and the constable being authorized to pursue any statute remedy for the purpose of collecting the same, they and this incumbrance, as has been heretofore decided in this case, is to be referred to the time of the date of the list. When the incumbrance became fixed upon the estate, the owner became entitled to discharge it by payment.

Judgment of the county court for the defendant reversed, and the case remanded for a new trial.

CASES
ARGUED AND DETERMINED
IN THE
SUPREME COURT
OF THE
STATE OF VERMONT,
FOR THE
COUNTY OF ORLEANS,
AT THE
AUGUST TERM, 1861.

PRESENT:

HON. ASA O. ALDIS,	}	ASSISTANT JUDGES.
HON. JOHN PIERPOINT,		
HON. LOYAL C. KELLOGG,		
HON. ASAHIEL PECK,		

JOHN MORRILL v. TOWN OF DERBY.

Contract. Practice.

The plaintiff promised the selectmen of the town of D. that if they would discontinue an old road passing through his land and lay a certain other new road to take its place, he would subscribe one hundred dollars towards it, and thereupon the selectmen laid the new road and contracted with K.

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to build it, and among other things promised he should have therefor the one hundred dollars subscription by the plaintiff; *held*, that as between the town and K., the town were under obligations to discontinue the old road in order to make the one hundred dollars available to K.

And where, after the new road had been finished and accepted, but before the old one had been discontinued, the selectmen directed the plaintiff to pay the one hundred dollars subscription to K., saying that the old road should be discontinued, and thereupon the plaintiff gave K. his note for that amount; *held*, that if the town neglected and refused to discontinue the old road, the plaintiff might recover of the town for the one hundred dollars, as so much money paid to their use.

Nor would it make any difference that there was an understanding between the plaintiff and K. that K. should not call upon the plaintiff for the note unless the old road was discontinued.

This was an action of assumpsit, tried at the June term, 1861, POLAND, Ch. J., presiding, the declaration containing special and general counts.

Plea, the general issue and trial by jury.

The plaintiff gave evidence tending to prove that in 1855 certain inhabitants of Derby were anxious to have an alteration made in a public highway for the distance of about one mile, by laying a new road for that distance, and discontinuing the old road between the same points.

The effect of such alteration would be to discontinue about one hundred rods of the old road through the plaintiff's farm, which he was obliged to fence upon both sides, while the proposed new route took none of the plaintiff's land. The plaintiff's testimony proved that such change in the road would add at least three hundred dollars to the value of the plaintiff's farm.

The change would carry the highway by the houses of Child and Kelsey, and they as well as the plaintiff favored it strongly. A petition was presented to the selectmen of Derby, signed by L. B. Child, M. M. Kelsey, the plaintiff, and others, dated June 15th, 1855, praying for such alteration.

The plaintiff added to his signature to said petition that he would pay the town one hundred dollars. The selectmen of Derby came out and examined the proposed alteration, but did not consider it of sufficient public benefit to have it done at a greater cost to the treasury of the town than

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fifty dollars. An arrangement was thereupon entered into by the selectmen and the persons interested in having such alteration made, as was intended and expected to secure the same at a cost of only fifty dollars to the town. Child agreed to build the road through his land without expense to the town. A subscription payable in labor was raised, amounting to ninety-five days' work, twenty-five of which were subscribed by the plaintiff, and the plaintiff agreed to pay the further sum of one hundred dollars in consideration of having the old road discontinued through his farm.

These sums, together with fifty dollars to be paid out of the treasury of the town, it was supposed would build the new road, and the selectmen proceeded to survey and lay out the new road.

The selectmen at the same time entered into a contract with Moses M. Kelsey to build said new road, for which he was to have the subscriptions payable in work before named, the one hundred dollars to be paid by the plaintiff to be relieved from the old road and fifty dollars to be paid by the town, and this was mutually understood and concurred in by all parties interested.

Kelsey was to have the new road completed by the following June, and it was understood between the selectmen, the plaintiff, Kelsey, and others interested, that as soon as the new road was completed for travel, the selectmen would discontinue the old road. It was understood, also, that the contract between the selectmen and Kelsey for the building of the road was to be reduced to writing, and Mr. Edwards was employed by the selectmen to draw up the contract, and when this was done the same was executed on the part of the selectmen by Ives the first selectman signing the names of all, and at the same time he gave an order on the plaintiff to pay the said one hundred dollars to Kelsey, and also an order to have the labor subscriptions paid to Kelsey, and affixed the names of all the selectmen to said papers.

It did not appear that either of the other selectmen were present, or that they gave any express authority to sign their names to either of said papers, but it did appear that Ives had a general authority and was in the habit of signing the names of

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all to papers, where the transactions were authorized by them. The said Kelsey underlet the building of said road, and after the same was completed by his sub-contractors, the selectmen were called upon to accept the same, which they did, by the said Kelsey's agreeing to do certain things upon it, and to keep it repaired the succeeding year. The subscriptions for labor were all paid to Kelsey, and when said road was accepted the selectmen gave Kelsey an order on the treasurer for fifty dollars, and told him to get the one hundred dollars of Morrill. Kelsey told them that the plaintiff might object to paying the one hundred dollars till the old road was discontinued over his land. The selectmen told him to fix it up with Morrill—that it should be made right with him and he should have the old road in June. Kelsey thereupon applied to the plaintiff and the plaintiff gave Kelsey his note for the one hundred dollars, payable to Kelsey, and Kelsey at the same time gave the plaintiff a writing that he was not to pay the note unless the old road through his land was discontinued. This writing was surrendered by the plaintiff to Kelsey before this suit was brought, and Kelsey claimed to be entitled to recover said note of the plaintiff but the same had not been paid at the time of trial.

The plaintiff's evidence tended to prove that Kelsey expended in building said new road more than the full sum of the labor subscriptions, the fifty dollars received from the town, and the one hundred dollars which the plaintiff was to pay for the old road, and that the same was properly expended, and that this had been expended before the plaintiff gave the note to Kelsey. It was conceded that that part of the old road through the plaintiff's land had not been discontinued, but that the same has ever been and still is continued as a public highway, and used as such.

The plaintiff also gave in evidence the record of the survey and opening of the old road by the selectmen of Derby in 1835. Also the records of the proceedings of a committee appointed by Orleans county court on petition of L. B. Child and others, praying for a discontinuance of said old road—discontinuing part, but refusing to discontinue the part through the plaintiff's farm.

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The defendants gave in evidence the record of the proceedings of Orleans county court, establishing a highway on petition of E. Cleveland and others, June term, 1836, which survey of highway was admitted to cover the old road in question in this case. They also gave evidence tending to prove that when the plaintiff gave up to Kelsey his agreement not to collect the plaintiff's note of one hundred dollars unless said old road was discontinued, Kelsey agreed not to call on the plaintiff to pay the note unless the plaintiff could collect the amount from the town, and that therefore this suit was really prosecuted for the benefit of Kelsey.

The defendants called Wilson and Morrill, two of the selectmen in 1855, who testified that they had no knowledge that any order was given, or was to be given by the selectmen in favor of Kelsey or Morrill for the one hundred dollars, and never authorized Ives to sign their names to such order, but they conceded that by the contract with Kelsey he was to receive the one hundred dollars which the plaintiff had agreed to pay to have the old road discontinued.

Wilson and Morrill denied that they made any contract with the plaintiff to discontinue the old road, but they conceded that it was fully understood and expected they were to do so, and that they supposed they had power to do so; and that Morrill was to pay the one hundred dollars in consideration of having the road through his farm discontinued.

They also testified that fifty dollars was all that the town was to pay for building the new road.

The defendants also gave evidence tending to prove that the ninety-five days' work subscribed and paid to Kelsey, and the fifty dollars paid him by the town, properly expended, would have built the new road as well as he built it.

The plaintiff claimed to recover the value of the twenty-five days' work subscribed and paid by him to Kelsey, and also the value of the old road to his farm. The court held that the plaintiff could not recover for the twenty-five days' work, as that was wholly a voluntary payment, nor the value of the old road. But the court intimated that they should instruct the jury that if, when said new road was laid out, and the contract made by

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the selectmen with Kelsey to build it, it was fully understood that the selectmen were to discontinue the old road through the plaintiff's farm, and that in consideration therefor the plaintiff was to pay one hundred dollars to Kelsey toward building the road, and that relying upon such agreement, Kelsey actually and properly expended the said one hundred dollars in building said road, for which the plaintiff had given his note to Kelsey, and said road had not been discontinued, then the plaintiff would be entitled to recover the same of the town, even though there was an understanding between the plaintiff and Kelsey that Kelsey should not call on the plaintiff to pay said note unless he recovered of the town, and though Wilson and Morrill had no knowledge of the order Ives gave Kelsey on the plaintiff, and gave no authority to Ives to sign their names to the same. Upon this intimation the defendants' counsel consented to a verdict for the plaintiff for the one hundred dollars and interest, with leave to except to such instructions. A verdict and exceptions were taken accordingly.

Peck & Colby, for the defendants.

— *Steele*, for the plaintiff.

PECK, J. In determining this question whether the charge is correct we must take the facts, which the charge of the court requires the jury to find, in connection with the other facts which appeared in the case, as undisputed, and treat the whole as having been found by the jury. Hence there is no objection to the charge on the ground that it makes it unnecessary for the jury to find that Ives had authority to sign the names of the other selectmen to the order he gave Kelsey on the plaintiff for one hundred dollars, as the case shows as undisputed facts that all the selectmen concurred in the agreement by which Kelsey was to have the subscriptions, that the contract was thereafter to be reduced to writing, and that Ives had a general authority to sign, and was in the habit of signing, the names of the other selectmen to papers to carry out transactions to which the others, as in this case, had assented. The charge on this point must be

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understood, therefore, as simply not requiring the jury to find in addition to this general authority any special, express or particular authority to sign this particular paper. We think in this sense it was correct as the giving of the order was only an appropriate mode of carrying out the agreement the selectmen had made, and in pursuance of their arrangement to have it reduced to writing.

By the terms of this agreement between the selectmen, Kelsey, and the plaintiff, (saying nothing for the present as to the authority of the selectmen to bind the town,) Kelsey was to build the road, the plaintiff was to pay Kelsey the one hundred dollars, and the town was to discontinue the old road across the plaintiff's land, which, as the case shows, would benefit the plaintiff some three hundred dollars by relieving his farm of the incumbrance of the old road. The town put itself under an obligation to the plaintiff to relieve his farm of the old road, and to Kelsey to discontinue the old road in order to make the one hundred dollar subscription available as it was payable on condition the old road should be discontinued. Kelsey having built the new road and taken this one hundred dollar subscription on the faith of the agreement by the town to comply with the condition on which it was payable, had a right to require the town to comply with this condition so as to make the subscription available, and, on the neglect of the town to do so, had a valid claim against the town for work and labor to the amount of the one hundred dollars. But it is insisted that the town was not bound to do this for the want of authority in the selectmen to bind the town to this stipulation; firstly, upon the ground that the old road having been laid by a committee of the county court the town had no right to discontinue it. It appears it was laid and opened by the selectmen in 1835, and also that it was covered by a survey of a road laid by a committee of the county court in 1836. But supposing the selectmen or town had no right to discontinue it, they had a right to lay the new road and contract with Kelsey to build it, and as Kelsey took this subscription in payment on the faith of the agreement of the selectmen to comply with the condition on which it was payable, and it failed to

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be available for want of authority in the selectmen to comply with the condition, it fails to be a payment, and leaves the town liable to pay the amount in some other way, especially as it appears from the case that the selectmen supposed when they made the contract that they had a right to discontinue it; and it is to be presumed the plaintiff and Kelsey acted under the same supposition, as there is nothing in the case showing that they knew that the road in question was laid otherwise than by the selectmen. The want of authority in the selectmen to discontinue the old road is not a defence which the town can set up against the claim on the part of Kelsey against the town for work and labor in constructing the new road, even if it is an excuse for not specifically performing the stipulation for discontinuing the old road, since the selectmen had authority to lay the new road and contract with Kelsey in behalf of the town to build it; and he having performed the labor, which went to the benefit of the town, the town, in default of the selectmen to procure the old road to be discontinued, whether such default is for want of authority to effect it, or for the wrongful neglect of the selectmen, was clearly liable to Kelsey to the amount of one hundred dollars, the jury having found that it was properly expended in building the road. In this condition of the parties when the road was completed by the town through their selectmen, the selectmen paid to Kelsey the fifty dollars the town was to pay and told him to get the one hundred dollars of the plaintiff, saying they would make it right with the plaintiff, and that he should have the old road—having previously given to Kelsey an order on the plaintiff to the same effect. This is equivalent to a request on the part of the town to the plaintiff to pay the debt the town owed to Kelsey, or, as the case states, “fix it up with Kelsey,” under an agreement that if the plaintiff would do so the town would make it right with the plaintiff, or let him have the old road by the first of June. If the plaintiff and Kelsey have complied with this request of the selectmen on the faith of such promise, the town is liable to the plaintiff on such agreement, and on the principle already stated in reference to the liability of the town to Kelsey. The town were liable to Kelsey, as already stated, absolutely, either to discontinue the old road

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so as to make the one hundred dollars subscription available or to pay that amount to Kelsey for work and labor. If the plaintiff and Kelsey have in pursuance of this request of the selectmen made this arrangement by which the plaintiff has paid or satisfied Kelsey's claim against the town and relieved the town from that liability, the town cannot resist the claim of the plaintiff on the promise of the selectmen based on that consideration. If the town can shield itself from liability on the promise for damages for not discontinuing the old road, they are still liable to the plaintiff for the amount of the consideration which the plaintiff parted with, as it inured to the benefit of the town by satisfying their liability to Kelsey. But has the plaintiff satisfied that liability? If the town is still liable to Kelsey, no right of action has accrued to the plaintiff by this arrangement. It was obviously the intention and the fair construction of the request of the selectmen to have Kelsey so fix up or arrange the matter as to relieve the town from their obligation to Kelsey, and substitute therefor a liability to the plaintiff, or, in other words, to substitute the plaintiff as their creditor in lieu of Kelsey. And it is equally clear that the negotiable note given by the plaintiff to Kelsey, and the surrendering of the order of the selectmen by Kelsey to the plaintiff was intended by Kelsey and the plaintiff, to have that effect notwithstanding the verbal agreement or understanding that the plaintiff should not call on Kelsey for payment, unless the plaintiff could collect the amount of the town. But for this verbal understanding it would be clear that the note must be regarded as a payment, and we think that with it it must be treated as a satisfaction of the liability of the town to Kelsey and if so, it is not material to the town that it was accompanied by this agreement; it was such as Kelsey was willing to accept in satisfaction, and we think no legal principle is violated by giving it the effect intended by the parties. It is to be observed that in this view of the case no new indebtedness or liability is created. It merely substitutes the plaintiff for Kelsey as creditor of the town by consent and agreement of the three parties, and this it was competent for the parties to do, even if the note was not technically a payment, if by the arrangement the town ceased to be liable to

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Kelsey, or, as it is termed in some of the cases, it was an equitable assignment of the debt, and substitution of a new creditor by agreement of all the parties.

We have already seen that Kelsey had a claim upon the town for work and labor if the town did not discontinue the road. The effect of this arrangement is in the nature of an assignment of this claim to the plaintiff by the consent and request of the town;—a promise by a debtor to pay the debt to the assignee, enables such assignee to maintain a suit in his own name against the debtor. A promise made before the assignment has the same effect if the assignment is made on the faith of it. In other words the town agreed that if the plaintiff and Kelsey would “fix it up” they would make it right with the plaintiff. The plaintiff and Kelsey did “fix it up,” and the town having neglected to perform its promise, the instructions of the court below compel the town to do simply what it agreed to do, that is, “to make it right with the plaintiff,” by paying him the \$100, which it would have been compelled to pay Kelsey but for this arrangement and substitution made by agreement of all parties—even if they had no power to discontinue the old road.

As to the objection that the new road was not legally or regularly laid, we see no irregularity in the proceedings left in the town clerk's office, that the town can take advantage after having in fact laid the road and contracted with Kelsey to build it, and accepted the road after it was built, and opened and used it two years as a highway—nor was any question of this kind raised in the court below, which of itself is a sufficient answer to this objection.

An objection has been made, though not much insisted on, that the contract to discontinue the old road is void as against public policy. We see no ground for this objection, but it is sufficient to say that the question, not having been raised in the county court, cannot be noticed here.

It is also objected that the plaintiff, if he can recover at all on the facts proved, cannot recover under this declaration. Whatever consideration this question might have merited, had it been made in the county court, not having been there raised it cannot be successfully raised here. When a question of this

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character is raised in the county court, the objection may be generally obviated by amendment, and a party is not at liberty to allow the case to go to the jury on the merits without objection to the declaration, and without raising the question whether the proof supports the declaration, and reserve his objections till the case comes into this court. The rule on this subject laid down by ROYCE, J., in *Peck v. Thompson et al*, 15 Vt. 643, is quite as favorable to the defendant as the present practice of the court will warrant. It is there said that no objection on the ground of variance not raised below, and which might have been obviated by amendment, is to be regarded, unless it is both apparent upon the record, and of such a character, that the judgment, if affirmed, will fail to protect the parties in reference to the matter actually litigated, when the merits have been tried. This was said in a case in which, as in this the county court instructed the jury that if they found certain facts proved, the plaintiff was entitled to recover, and the defendant excepted to the charge. There is nothing in this case to bring it within either of the exceptions contained in the rule above stated—for it is quite clear that justice has been done, and equally clear that the judgment in this case will be a full protection to the parties: the defendant cannot hereafter be liable to Kelsey, since by the very terms of the arrangement between the plaintiffs and Kelsey relied on by the defendant's counsel, the plaintiff was to have this remedy on the defendant in consideration of the note he gave, and the note was to become absolute, if the plaintiff recovered the amount of the defendant. Kelsey therefore will be estopped to claim as against the town that he has not got satisfaction by his own agreement:—his remedy will be solely against the plaintiff. This objection for this reason must be overruled, even if it would have availed the defendant, had it been raised in the county court, and this conclusion is the more just as the objection might have been obviated by an amendment, which was within the power of the county court to have allowed—if any amendment was necessary.

Judgment affirmed.

Swazey v. Brooks.

JOHN SWAZEY v. JOSHUA BROOKS.

Deed. Appurtenances. Covenant.

The word *appurtenances* in the *habendum* of a deed, when none are specified, will not be construed to convey anything except what was legally appurtenant to the land in the hands of the grantor; and, therefore will not be extended so as to convey an easement in the land of another, which, by reason of not having ripened into a legal right, had not become legally attached to the premises conveyed, unless accompanied by proper words describing it, and showing the intention of the grantor to pass it.

In order to recover for the breach of a covenant of warranty in a deed of land, the plaintiff, if he relies on an eviction, must show one by a lawful title in the person evicting, existing before or at the time of the grant.

COVENANT. The facts in the case are sufficiently stated in the opinion of the court. The case was tried by jury at the December term, 1858, BENNETT, J., presiding.

Upon the facts in the case, including those which the plaintiff claimed he could prove, the county court directed a verdict for the defendant, to which the plaintiff excepted.

Geo. C. & Geo. W. Cahoon and Peck & Colby, for the plaintiff.

T. P. Redfield, for the defendant.

KELLOGG, J. The defendant executed a deed on the 12th of January, 1829, conveying to Joseph Swazey and his heirs and assigns, "lot No. 19 of the first division of the right of Benjamin Inghram Jr., in the town of Charleston. The *habendum* is "to have and to hold the *above granted and bargained premises*, with the *appurtenances thereof* unto him the said Joseph Swazey, his heirs and assigns forever, to his and their own proper use, benefit, and behoof;" and the deed contains the usual covenants of seizin and against incumbrances, and also a covenant of warranty, "to warrant and defend the *above granted and bargained premises* to the said Joseph Swazey, his heirs and assigns, against all claims and demands whatsoever." The title and estate of Joseph Swazey in the premises conveyed passed through several intermediate conveyances to the

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plaintiff, and became vested in him before the commencement of this suit. A water-course, called Clyde river, runs through said lot No. 19, and, at the time of the defendant's conveyance to Joseph Swazey there was a mill dam on said lot across the river, which, with a saw mill therewith connected, had been previously built by one Varnum. This is an action of covenant broken, founded on the covenants in the defendant's deed, and the plaintiff claims the right to maintain the action as the assignee of the defendant's grantee. As a ground of recovery, the plaintiff on trial, relied upon two judgments recovered against him by one Stephen C. Cole, who owned the land on the river above and contiguous to said lot No. 19, for damages which the said Cole had sustained by reason of the water setting back from the said dam, which had been maintained and kept up by the plaintiff upon the land next above and adjoining said lot No. 19, which was so owned by said Cole, as aforesaid, accompanied by evidence showing that he, the plaintiff, had paid said judgments, and that the defendant was duly and seasonably notified by him to defend the suits in which those judgments were rendered, but did not appear in the same.

When this case was before this court on a former occasion, (30 Vt. 692) it was held that the plaintiff's right of recovery, if he had any, must rest upon the covenant of warranty, and the question now presented is whether the facts appearing in the bill of exceptions are sufficient to entitle the plaintiff to recover on that covenant. It was admitted, for the purposes of the trial, that Cole entered into the possession of the land above lot No. 19, in the summer of 1827, which was after the execution of the deed from the defendant to Joseph Swazey, and that at that time the land above lot No. 19 was wild and uncultivated, and had not ever been divided among the proprietors of the township, and that he, in the same year, cut down some trees upon the land, and has occupied it ever since; and that in the spring of 1828, the land was laid out into lots of the third division, of ten and three-fourths acres each. The plaintiff claimed that Varnum, who had previously purchased lot No. 19 of the defendant, and had at the same time mortgaged it back to the defendant, built

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the saw mill and dam thereon in 1820 or 1821, and that the dam was built sufficiently high to throw the water back upon the land next above lot No. 19, and that the effect of the dam was to flow the water back upon the land above lot No. 19, and upon the land which Cole commenced first to occupy in the summer of 1827, and that the dam was kept up by Varnum at its original height, and flowed the water back upon the land above lot No. 19 up to the time of the execution of the defendant's deed to Joseph Swazey on the 12th of January 1827, and that Varnum claimed the right to flow the water back upon the land above his lot during his occupancy; but the plaintiff admitted that no one was in possession of the land above lot No. 19 during all that time. The county court decided that these facts, if established, would not, in connection with the other facts which the plaintiff's testimony tended to prove, be sufficient to entitle him to recover; and we are therefore to treat the case the same as if these had been admitted facts. The case as before presented to this court is now varied in its material features only by the plaintiff's claim, which we are to treat as an admitted fact, that before the time of the execution of the defendant's deed to Joseph Swazey, Varnum, by means of the dam, caused the water to flow back upon the land above lot No. 19, and claimed a right to have it so flow back.

Was such a right conveyed by the defendant's deed to Joseph Swazey? This question must turn upon the meaning and operation of the word *appurtenances* as used in the *habendum* of the deed. The right which the plaintiff claims as passing under the deed is a right to flow the water by means of the dam back upon the land above lot No. 19, and is an easement in the land above that lot. The subject matter of the grant, as expressed in the defendant's deed, is lot No. 19, but it does not, in terms, include the easement; and the covenant of warranty is co-extensive with the subject matter of the grant. The defendant by his deed granted his lot in the state in which it then was, and we do not doubt that the grant carried with it everything naturally or necessarily incident or appurtenant to its subject matter; but such appurtenances only would pass as existed at the time of the grant. In order to acquire a legal right by user to the easement or privi-

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lege of flowing outside of the tract conveyed, the user must have been adverse and uninterrupted for a period of fifteen years, as in the case of other rights in real estate acquired by adverse possession under the statute of limitations. It is clear that, whatever might have been Varnum's *claim* in respect to a right to flow the land above lot No. 19 by means of his dam, he acquired no legal *right* to any easement in that land by the length of his use of the dam, which was less than half of the time required to mature such a right by adverse user and enjoyment merely; and it is equally clear that the defendant (to whom the title of Varnum was transferred by the foreclosure of the mortgage executed by Varnum when he purchased the premises,) possessed no such right at the time of the execution of his deed to Joseph Swazey. There is nothing in the case to show that the defendant ever claimed, or professed to convey, any easement or privilege in the land outside of the limits of lot No. 19, and we can find no ground for supposing that he intended to convey any right or privilege which was not legally appurtenant to that lot in his hands. We think that the word *appurtenances* in the *habendum* of the defendant's deed has its full force and application when it is confined to existing rights which naturally and necessarily belonged to the thing granted in the hands of the grantor, and that it ought not to be extended so as to carry an easement in other land, which, by reason of not having ripened into a legal right, had not become legally attached to the premises conveyed, unless accompanied by proper words describing it, and showing the intention of the grantor to pass it. We do not intend to deny that this word is sufficient to carry an easement outside of the limits of the parcel of land conveyed; but in a case in which the title of the grantor to the thing granted is unquestioned, we think that the operation of this word in carrying easements in land outside of the limits of the parcel conveyed should be confined to such easements as had, at the time of the grant, ripened into legal rights, and become legally attached to the subject matter of the grant in the hands of the grantor,—or, in other words, that this word *appurtenances* where none are specified, should not be construed to convey anything except what was legally appurtenant to the land in the hands of

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the grantor. *Dunklee v. Wilton R. R. Co.*, 4 Foster (N. H.) 489; *Tabor v. Bradley et al.* 18 N. Y. 109.

We are aware that in the case of the *Vermont Central R. R. Co. v. Estate of Hills*, 23 Vt. 681, it is intimated *per curiam*, that even if the owner of the land had acquired no perfect right, a general conveyance of the land with all its privileges and appurtenances, the aqueduct being in use, would bind the grantor to defend the title to it, if he gave covenants of warranty, &c.; but this point did not arise on the facts in that case, as the grantor had, at the time of his conveyance, a perfect right to the easement claimed, and this intimation, which is *obiter* merely, seems to us to proceed upon too broad ground and not to be warranted by the adjudged cases. The cases of *Oakley v. Stanley* 5 Wend. 523, (cited on the part of the plaintiff) and *Burr v. Mills* 21 Wend. 290 and *New Ipswich Factory v. Batchelder*, 3 N. Hamp 190, are cases in which the easement claimed existed in other lands of the grantor, outside of the land granted, at the time of his grant, and those cases are not inconsistent with our conclusions in this case. We have not been able to find any case in which the word *appurtenances* where none were specified, has been held to pass any rights or privileges *in alieno solo*, or in lands outside of the limits of the subject matter of the grant, as necessarily incident to the thing granted, unless they legally existed in the grantor at the time of his conveyance.

The plaintiff's action must, in our opinion, also fail on another ground. Admitting that the recovery of the judgments by Cole against the plaintiff should be treated as equivalent to an eviction, yet to constitute a breach of the covenant of warranty, an eviction of the grantee or his assignee, by a lawful title in the person evicting existing before or at the time of the grant, is indispensably necessary. It was incumbent on the plaintiff to show that the title under which the adverse judgments were obtained was not one derived subsequent to the execution of the defendant's deed; and this notwithstanding the notice given by him to the defendant to appear in and defend the adverse suits. *Pitkin v. Leavitt*, 13 Vt. 379, 384. At the time of the execution of the defendant's deed, Cole appears to have had nothing but a mere claim of title in the land above lot No. 19, unaccompanied by

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any possession ; and the plaintiff admitted on the trial that at the same time, the land above lot No. 19 was vacant and undivided, and that no one was then, or had previously been, in possession of the same. These being admitted facts in the case, it is quite impossible to say that the title upon which Cole's recovery against the plaintiff was obtained, was an existing and paramount title at the time of the execution of the defendant's deed.

As we find no error in the decision of the county court, it is not necessary to consider other points, tending to the same conclusion, which were made in the argument.

The Judgment of that court in favor of the defendant is affirmed.

CASES
ARGUED AND DETERMINED
IN THE
SUPREME COURT
OF THE
STATE OF VERMONT,
FOR THE
COUNTY OF CALEDONIA,
AT THE
AUGUST TERM, 1861.

PRESENT:

HON. ASA O. ALDIS,	}	ASSISTANT JUDGES.
HON. JOHN PIERPOINT,		
HON. JAMES BARRETT,		
HON. LOYAL C. KELLOGG,		

JOHN EASTABROOKS v. CHARLES B. PRENTISS.

Witness. Evidence. Husband and Wife.

In order for the wife to be a competent witness for the husband under the act of 1858, (see Session Laws of 1858, p. 23,) it seems her evidence must be of matters conducted by her as agent of the husband, and of which he has no personal knowledge.

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When it became material to show the state of the plaintiff's accounts at a given time, and it was shown the books were kept by the wife, but from original memoranda kept by the husband from day to day, *held*, she was not a competent witness for the plaintiff, under the act of 1858, to show the state of the accounts at that time.

This was an action on note, tried at the June term, 1860, POLAND, J., presiding. The defendant pleaded the general issue, and two pleas in bar. The case was tried by jury.

It appeared on the trial that the plaintiff the year previous to the date of said note, carried on the business of butchering, and the defendant was employed by him to peddle meat, and in the course of said business received considerable sums of money belonging to the plaintiff. The plaintiff claimed and testified that on settlement between him and the defendant a balance was found due to the plaintiff, for which the defendant gave this note.

The defendant claimed and testified that on said settlement, the accounts between the plaintiff and the defendant were even, but that the plaintiff had before that assisted him in covering up and concealing certain of his property to keep it out of the reach of the defendant's creditors, and that when said settlement was made, the plaintiff wanted this note executed, so that in case he should be called on by the defendant's creditors, he could show that the defendant was indebted to him, and that the note was given for that purpose, but for no real consideration. All this was denied by the plaintiff.

The defendant introduced his book, showing the account between him and the plaintiff, but testified that he had another book on which a portion of the account was kept, which was lost. He also testified that the books were kept by his wife, and the charges thereon made by her from memoranda kept by him from day to day.

The defendant then offered the deposition of his wife to show the state of the accounts and loss of the book. The plaintiff objected to the deposition on the ground that the defendant's wife was not a competent witness to testify to such facts. The court excluded the deposition upon that ground. The defendant excepted to the rejection of said deposition.

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Theron Howard and Stoddard & Clark, for the defendant.

Bliss N. Davis, for the plaintiff.

BARRETT, J. It stands confessed that, as the law was prior to the act of 1858, the wife would not be a competent witness in chief upon the main issue in this case. But it is claimed that under the third category of that act, in which her disqualification as a witness is removed, she was competent, and her deposition should have been received. The language is: "In all matters of business transactions, where the transaction was had and conducted by such married woman as the agent of her husband."

If, by force of this provision, the wife was competent to testify, it was because what she did in the keeping of the books falls within the meaning of a "business transaction had and conducted by her as the agent of her husband." We understand from the exceptions that her keeping of the books consisted in her making the charges from memoranda kept by the husband from day to day. This certainly would constitute a novel kind of agency, within any meaning which that term bears, either in law or literature. She seems to have been a mere copyist, or amanuensis for her husband, in making the formal entry of charges, in business transactions had and conducted *by the husband*, without any participation of the wife therein. This is as far as possible from the agency contemplated by this provision of the statute. It is well understood, as the entire scope and language of the statute indicates, that the purpose of that provision was to enable proof to be made of transactions of which the husband had not personal knowledge, and the wife had, for the reason that she personally negotiated, as a substitute for, and in the place of, her husband, in such transactions. This is illustrated by the common case of purchases made by the wife at the stores, without the presence of the husband, in the usual course of shopping, as it is called, by the purchase of meats and other provisions from the butcher's cart and grocery as current need requires, without the husband knowing either quantity, kind or price; as well as by the various matters of business

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which may be done by the wife, either upon special or implied authority from the husband, in his absence.

As the point for decision stands upon the provision of the statute above named, the cases cited in argument do not apply as authority or illustration. The only question is, does that provision cover this case. We think it does not; and thinking so, it would be quite as improper for us to suffer our decision to be influenced by the appeal to our gallantry, which has been most eloquently made, as to considerations of policy or expediency.

Judgment affirmed.

CHARLES W. PRENTISS v. CALVIN BLAKE ET ALS.

Deed. Principal and Agent.

A father and son being both named D. F., the father purchased a piece of land, taking the deed to D. F., jr., describing him as of the town where they both resided, and himself executed notes for part of the purchase money and a mortgage of the land to secure the same, by the name of D. F., jr., and said nothing of his acting as agent for his son, and the grantor supposed the father was in fact the purchaser, that his name was D. F., jr., and that he was deeding the land to the father. Some of the evidence tended to prove that the son had authorized the father to buy the place in his, the son's name, and that he paid either directly or indirectly the whole price thereof. *Held*, that it was a question of fact for the jury to decide whether the son was or was not the real principal and the purchaser of the land, and that if they found he was, then the title vested in him and not in the father.

EJECTMENT for the easterly half of lot No. 26, in Wheelock.

The defendants pleaded the general issue, and the case was tried by jury at the December term, 1859, POLAND, J., presiding. The plaintiff read in evidence the record of a judgment in his favor against David Felker recovered in Washington county court, March term, 1851, and an execution on the same judg-

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ment and a set off thereon of the premises sued for; also, the record of a judgment in his favor against the said David Felker in an action of ejectment for the same premises, rendered at the June term, 1852, of the Caledonia county court.

The plaintiff then gave evidence tending to show that said David Felker in September, 1847, then a resident of Barton, applied to T. J. Cree of Wheelock, who then owned the premises in question, to purchase the same, and having agreed as to the price and terms of payment, said he would bring his wife to see the place, and if she was suited, complete the purchase. In a few days Felker came with his wife, and the trade was consummated. Felker paid Cree one hundred dollars, and gave notes to Cree for the balance, five hundred and twenty-five dollars, payable one hundred dollars a year, in semi-annual payments, Felker saying that he wished it so, for the purpose of meeting the payments from his pension, which he drew half-yearly. When the writings were executed, Felker took the deed from Cree to David Felker, jr., and executed the notes and a mortgage to secure the same, signing them David Felker, jr. Felker said nothing about purchasing for any person but himself and acted apparently on his own behalf, and Cree supposed he was purchasing for himself, and that his name was David Felker, jr. Said David Felker moved immediately on to said premises and resided thereon with his family for some three or four years, occupying and cultivating the same and consuming the products in his family as the apparent owner, and also paid the five notes to Cree which first fell due.

The defendants then read in evidence a deed of the premises in question from T. J. Cree to David Felker, jr., dated September 30, 1847; also a deed from David Felker, jr., to A. B. Matthewson, dated September 1, 1854, of the same premises; also, deeds from Matthewson of various subsequent dates of parcels of the same premises to each of the different defendants, and it was admitted that each of the defendants was in possession of some part of the demanded premises, claiming from Matthewson, at the time of the commencement of the plaintiff's suit.

It was conceded, also, that when David Felker, jr., deeded to Matthewson, he gave Matthewson a bond of indemnity against

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the plaintiff's levy, and that all the defendants had knowledge of the plaintiff's claim of title when they purchased. This suit was defended by David Felker, jr., under whom the defendants claim, and he gave evidence tending to prove that his father, the said David Felker, in the year 1847, had become entirely destitute of property, and had no home or place to live; that he had a wife and several minor children; that in the fall of 1847 he applied to his son the said David Felker, jr., (who then carried on the trade of a blacksmith at Barton,) to purchase a small farm to make a home for himself and his family; that said David, jr., replied that he was too busily engaged in his shop, that he could not spend the time to go and find a place, but that if said David would go and look up a place that would suit him, the said David jr. would purchase it to make a home for the family; that David sen'r went to Wheelock and saw the place belonging to Cree, and came back and informed said David jr. in reference to the place and terms of payment, and a day was fixed for both to go down and have the papers executed, but on that day said David jr. was so busily engaged in his shop that he could not leave, and that he consulted a lawyer to know if his father could not do the business as his agent, and was informed that he could; that he accordingly furnished his father the one hundred dollars to make the cash payment to Cree, and sent him to complete the purchase for him; that he told David sen. to have the notes made so payable that he could take them up with his pension money and bring them to him so that he could pay them to him, and save himself any trouble about them; that David sen'r while he lived on the place did make payment of the five notes first due out of his pension money, and brought them to David jr. who paid over the amount of said five notes to him; that about 1850 David sen'r left his family and the place, and that the residue of said notes were paid by David jr. to Cree with his own money.

David jr. testified that he supposed David sen'r in making the purchase informed said Cree that he was acting as agent for David jr., and had no knowledge to the contrary, and that when David sen'r returned from Wheelock he brought and delivered the deed from Cree to David jr.; that he supposed his father exe-

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cuted the notes in his, David jr.'s, name, but did not know he gave any mortgage at all.

The plaintiff claimed and requested the court to charge the jury that if David Felker, sen'r, made the purchase of the premises of Cree in such a manner that Cree supposed he purchased for himself, and that he was the person to whom he was conveying the premises, then the title vested in him, and the plaintiff would be entitled to recover, though in fact David Felker, sen'r, was acting as the agent and on behalf of David Felker, jr. The court declined so to charge, but did charge the jury that the deed being to David Felker, jr., upon its face was a conveyance to the son and not to the father, but that the word junior added to a name is not regarded in law as any part of the name itself, and that evidence was admissible to show to which of the two persons of the same name a conveyance was in fact made; that the plaintiff's evidence that the sale was in fact made to David Felker, sen'r, and the notes and mortgage deed executed by him apparently acting on his own behalf, and without disclosing that he was acting as agent of David Felker, jr., would establish *prima facie* that the sale and conveyance were to David Felker, sen'r; but that if it was established to the satisfaction of the jury that he was really employed by David Felker, jr., as his agent, to make the purchase for him, that David jr. furnished the money to pay for the place, and that David sen'r in fact was acting in the behalf of David jr. in taking the deed, then the conveyance was to David jr., though his agency was not disclosed to Cree, and Cree supposed that David sen'r was the man to whom he was making the conveyance; and that after the evidence of the plaintiff above stated the burden of showing the agency of David Felker, sen'r, in the transaction was upon the defendant. The jury returned a verdict for the defendants. The plaintiff excepted to the charge as above detailed, and to the refusal to charge as requested.

John H. Prentiss, for the plaintiff.

David T. Corbin, for the defendants.

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KELLOGG, J. This is an action of ejectment for land in Wheelock, to which the plaintiff claimed title by virtue of a levy and set off on an execution in his favor against David Felker, and of a former recovery in an action of ejectment for the same premises against the same David Felker. The defendants respectively claimed title to parcels of the same premises under David Felker, jr., the son of said David Felker, by intermediate conveyances which transferred his estate therein. It was conceded by both parties that the land was originally owned by T. J. Cree, and that it was conveyed by said Cree on the 30th September, 1847, by a deed, to a grantee who is named therein as "*David Felker, jr., of Barton, in Orleans county,*" and it appeared that the two Felkers, father and son, at that time both resided in Barton. The plaintiff's evidence tended to show that the father made the bargain with Cree for the purchase of the land, and agreed with him upon the price, and the terms of payment, and paid to him one hundred dollars at the time of the execution of the deed, and executed to him several promissory notes for the balance of the purchase money, and also a mortgage to secure the payment of the same, signing both the notes and the mortgage with the name of "*David Felker, jr.,*" and said nothing about purchasing the land for any one but himself, and acted throughout the transaction apparently in his own behalf; that Cree supposed that he was purchasing for himself, and that his name was in fact David Felker, jr.; and that the said Felker, the father, moved on to said land immediately after said purchase, and occupied the same for several years as the apparent owner, and also that he paid to Cree several of the said promissory notes which first became due. It was conceded on the part of the defendants that they each had knowledge of the plaintiff's claim of title when they purchased their respective parcels of the land in controversy, and that David Felker, jr., the son, when he conveyed the land to their grantor, gave to him a bond of indemnity against the plaintiff's levy; and this suit was defended by said David Felker, jr., the son. The defence set up was that the said David Felker, the father, in making the purchase of the land of Cree, and in the negotiations connected

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therewith, and in taking the deed from Cree, and in making the payments which he made to Cree, was in fact the agent of his son; that the money so paid was the money of the son and not of the father; and that the son paid the balance due upon the notes executed for the purchase money. Under the charge of the court, the jury found, from the evidence in the case, that the father was in fact employed by the son as his agent to make the purchase for him of Cree; that the son furnished the money to pay for the place; and that the father was in fact acting in behalf of the son in taking the deed, though his agency was not disclosed to Cree, and Cree supposed that the father was the man to whom he was making the conveyance; and the jury returned a verdict for the defendant. The plaintiff requested the court to charge the jury that if the father made the purchase of the land of Cree in such a manner that Cree supposed that he purchased it for himself, and that he was the person to whom he was conveying the premises, then the title vested in him, and the plaintiff would be entitled to recover, though in fact the father was acting as the agent and on behalf of the son; but the court declined so to charge. The plaintiff's grounds of exception to the instructions given to the jury are in substance the same which are applicable to the omission of the court to recognize this proposition,—the exceptions taken by the plaintiff being applicable to the charge, and the omission to charge as requested, in this particular.

The case presents facts of a peculiarly novel and anomalous character, but the real question is, to whom did the legal title pass under the deed executed by Cree? The addition of "junior" is in law no part of a person's name, but it is used as merely descriptive of the person, and is assumed, applied, and discarded at will. *Brainard v. Stilphin et al.*, 6 Vt. 9; *Blake et al. v. Tucker*, 12 Vt. 39; *Isaacs v. Willey et al.*, 12 Vt. 677. Its use in this deed as an addition to the name of David Felker as the grantee is not therefore necessarily conclusive as a description or designation of the person to whom the title was transferred, if two or more persons will answer the same and the other matters of description in the deed. The addition is at the best but presumptive evidence that of two persons bearing the

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same name the person thus designated is the younger. In this deed the grantee is named as "*David Felke, jr., of Barton, in Orleans county,*" and it appears that there were two persons of the name of David Felke who resided in Barton at the time of the execution of this deed, one of whom was the father of the other. The deed itself, consequently, does not conclusively determine which of these two persons answers the description of the grantee, though it furnishes a presumption by the use of the word *junior*, added to the name of the grantee, that this addition was intended to designate the younger of the two; but this is a presumption which is subject to be controlled by evidence *aliunde*, because in fact the father might have used, or been designated by, this addition. Whenever the description of the grantee, as contained in the deed, is equally applicable to two or more persons, the aid of extrinsic evidence must be sought to determine which of them was in fact the grantee, and this would be a question of personal identity. The plaintiff claims that this question must be determined by the *intention* of the grantor; and the defendants insist that the *actual purchaser* should be considered as the grantee intended, if he will answer the description of the grantee named in the deed.

An agent may be authorized by parol to treat for and buy an estate, or to act upon a contract or sale of premises; and, though he purchase in his own name, yet the fact of the agency so as to charge the principal may be made out by parol evidence, though the principal was not known to the other contracting party at the time the agreement was made, and the agent acted as, and appeared to be, the principal. Sugden on Vendors and Purchasers, (13th Ed.), p. 118; Chitty on Contracts, (10th Amer. Ed.), pp 222, 240. The rule is equally applicable to contracts for the sale of real and personal property, the contract of the agent being in law the contract of the principal. There is an exception in the case of a *deed*, which cannot be executed by an agent so as to bind his principal, unless the authority to execute the instrument be conveyed by a specialty. In the large class of commercial transactions conducted through the agency of factors and brokers, the cases are very frequent in which the principal is personally liable upon any contract of his agent, if made

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within the scope of the authority given, although the agent made the bargain in his own name, and appeared at the same time to act for himself, so that in fact the principal could not have been trusted, or his credit or responsibility regarded or required, at the time of the bargain. The rights and liabilities arising from the contract of sale are attached to the real principals when they are discovered or disclosed. In this case, then, Cree would have been entitled to an action for the price of the premises sold against the real principal, although the contract was made by an agent who appeared at the time to act for himself, so that Cree could not have supposed that he was dealing with him otherwise than with a principal, and was in fact ignorant of his real character. If the truth of the transaction would thus affect the remedy of Cree against the real principal, it is difficult to find any ground upon which we could deny to such principal the benefit of a contract upon which he is liable. The intention of Cree in respect to the grantee should not therefore be regarded as necessarily determining the question of personal identity, when it appears, as it does in this case, that the real principal in making the purchase answers the description of the grantee given in the deed. The case is not like that of the right or title to an office in which the intention of the elector may be material, but, even in such cases, the intention of the voter is to be inferred not from evidence given by him of the mental purpose with which he deposited his ballot, or his notions of the legal effect of what is contained or omitted, but by a reasonable construction of his acts. *The People and Hommell v. Saxton*, 22 New York, 309. Whatever may have been the right of Cree, arising from the conduct of the elder David Felker in personating his son by executing notes and a mortgage in his name, we do not think that third persons, who then had no connection with, or interest in, the transaction, are entitled to assume the position of Cree, or stand upon his right, against the equity of a real principal who furnished the money to pay the consideration for the conveyance.

We regard the only important question which the case presents as being, which of the two Felkers, the elder or the younger, sustained the character of the real principal in the transaction

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with Cree; and this was a question of fact which, in our opinion, was submitted under proper instructions to the jury. Our conclusions upon the evidence in the case might have been different from those established by the verdict, but the finding of the jury on an issue of fact properly submitted is not subject to revision in this court. The judgment of the county court in favor of the defendant is affirmed.

NATHAN W. RUGGLES v. GEORGE B. WALKER.

Lien of Manufacturers.

The manufacturer of starch is entitled to a lien on the same for the price of manufacturing, notwithstanding it was manufactured under a special agreement providing for the payment of such price in advance.

But this lien is purely a personal privilege and cannot be sold or transferred. It amounts only to a right of detaining the property until the price of manufacture is paid, and the retention of the possession of the property, or a portion of it, is essential to its continuance.

The plaintiff's declaration contained counts in trespass and trover for taking and converting four tons of starch. Plea not guilty, and trial by jury at the December term, 1859, POLAND, J., presiding.

The plaintiff gave evidence tending to prove the following facts: In March, 1859, Daniel Whipple owned a starch factory in Lyndon, and that the defendant owned a quantity of potatoes in said factory. Whipple had failed and all his property had been attached, and he was desirous to make an arrangement so that he could have the avails of his personal labor for his own use. Accordingly he made a contract with the defendant to manufacture his potatoes into starch, for which the defendant was to pay him ten dollars per ton in advance.

Whipple commenced working the potatoes, and when he had

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finished three or four tons and put the same into casks and had several tons finished except putting the starch into casks, he applied to the defendant to pay him for what he had finished, and told the defendant he feared he would be trustee and he should lose his earnings. This was on Saturday, April 3. The defendant said he could not pay him for he was going to Boston, and on the next Monday he did go to Boston.

On the following Thursday, Whipple applied to the plaintiff to advance him the amount of his lien on the starch, and the plaintiff then let Whipple have one hundred dollars. At the same time Whipple delivered to the plaintiff eight casks of the starch, being about two tons, and on the following Monday, Whipple having finished the starch, the plaintiff paid him the balance due him for manufacturing the starch, making in all the sum of one hundred and sixty-seven dollars and eighty-one cents, which was conceded to be the amount due for manufacturing the starch. At this time Whipple delivered to the plaintiff four more casks of starch to hold as security for the payment of the price of manufacturing. The whole of these twelve casks of starch were moved by the plaintiff to a barn a few rods from the factory and marked with the plaintiff's name. The plaintiff notified the defendant that he had purchased Whipple's claim on the starch, and that he could have it by paying what he had paid Whipple on the starch. It was conceded that the twelve casks contained about three tons of starch worth about sixty dollars per ton. It was conceded that on the day that the plaintiff took the last four casks of starch as above stated, the defendant took away all the starch from the factory, and also the twelve casks so delivered to the plaintiff without paying the price for manufacturing.

The defendant's evidence tended to contradict the plaintiff's in several particulars, but is not material to be stated in order to present the legal questions raised on the trial.

The defendant's counsel claimed and requested the court to charge the jury —

1st, That under the contract between Whipple and the defendant, Whipple had no valid lien on the starch for the price of manufacturing the same.

2d, That if he had, he could not transfer the same to the

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plaintiff, so as to enable him rightfully to hold the starch against the defendant.

3d, The plaintiff could only recover for the lien on the three tons of starch in his possession, at the rate of ten dollars per ton, and not for the price of manufacturing the whole.

But the court declined so to charge the jury, but did charge them that Whipple had a lien on the starch for the price of manufacturing; that he could transfer the same to the plaintiff with a portion of the starch, so as to give the plaintiff a lien upon the same, and that if the defendant had notice of the transfer to the plaintiff and took away the starch without paying or offering to pay the price, the plaintiff would be entitled to recover the whole price of manufacturing.

The defendant excepted to the refusal to charge as requested, and to so much of the charge as is stated above.

T. Bartlett, for the defendants.

E. A. Cahoon, for the plaintiff.

KELLOGG, J. The first question in this case is, whether Whipple, the plaintiff's assignor, had any lien on the property which is the subject of the action, for the price of manufacturing it; and the second, whether if he had a lien, it was of such a character as to enable him to transfer it with the property by assignment to the plaintiff, so that the plaintiff could rightfully hold the property against the defendant. It is conceded that the general property in the starch manufactured by Whipple was in the defendant.

L. A lien is a right to retain in one's possession another's property until some demand due to the person retaining has been satisfied. *Hammond v. Barclay*, 2 East 235. It is a settled principle that where a party has, in the way of his trade or occupation, bestowed his money, labor, or skill upon a chattel, in the alteration and improvement of its properties, or for the purpose of imparting an additional value to it, he has a lien upon it for a fair and reasonable remuneration, or for the contract price, if the price has been fixed by agreement; and this, though

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the chattel be delivered to him in different parcels, and at different times, if the work to be done under the agreement be entire. *Chase v. Westmore*, 5 Maule and S. 180. This is the ordinary lien of manufacturers, workmen, and artificers. Whipple was therefore entitled to this lien for the starch manufactured by him for the defendant; and although the contract called for the payment of the price of manufacturing the starch in advance, yet we think that the neglect or refusal of the defendant to make such payment should not affect the right of lien. The mere existence of a special agreement will not, of itself, exclude that right except in cases where the terms of the agreement are inconsistent with it. In *McFarland v. Wheeler*, 26 Wend. 467, it was expressed as the opinion of the court that when goods or other articles subject to a particular lien are delivered in part, those retained may be held to secure the payment for all the labor, skill, or expense laid out upon the whole under one and the same contract between the same parties, thus constituting one debt; and the case of *Blake v. Nicholson*, 3 Maule and S. 168, is alike in principle.

II. The more important question is, whether Whipple's lien was of such a character as would enable him to transfer it with the property by assignment to the plaintiff. The rule, as generally stated by text writers, is that the right of lien is a personal right which cannot be parted with, and that a person who has a lien can not sell his right to another, nor can he transfer the property over which the lien extends, without losing his right, unless the property has been pledged to secure the payment of money advanced, with an express or implied power of sale. 2 Kent's Comm., 642; Addison on Contracts, 1155. It is said by BULLER, J., in *Lickbarrow v. Macon*, 6 East 27, *in notis*, that he who has a lien only on goods has no right to sell or dispose of them, but only to retain them until the original price be paid; and the same profound jurist says, in *Daubigny v. Duval*, 5 D. & E. 604, that "a lien is a personal right, and can not be transferred to another." An innkeeper who has a lien on the horse of his guest for his keeping has no right to sell the horse except by the custom of London. *Jones v. Pearle*, 1 Str. 556; *The case of an Hostler*, Yelv. 67. In *Holly v. Huggefords*, 8 Pick.

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73, the lien of a factor was held to be a personal privilege which could not be set up by any other person in defence of an action by the principal. The case of *Doane v. Russell*, 3 Gray 382, fully recognizes the rule that the right of lien is a personal right to detain in contra-distinction to an interest in the property, and that if a party parts with the article by a pledge, sale or otherwise, he loses his lien. In that case, the question was whether the defendant who held a mechanic's lien on a wagon for the payment of his work and materials, had a right, upon notice, and in case the bill was not paid in a reasonable time, to sell the wagon to enforce the lien; and it was held that he had no such right, and that a party having a lien only, without a power of sale superadded by agreement, can not lawfully sell the chattel for his reimbursement. SHAW, Ch. J., in his opinion in the case, distinguishes between a lien for work and materials, as given by what was anciently called the custom of the realm, or now the general law, and an express pawn or pledge of goods by the owner as collateral security for a loan of money, and says that "in the latter case, it is now held that when the debt has become due, and remains unpaid, the creditor, after a reasonable time, may sell the pledge; but otherwise when there is a mere lien, as in the case of mechanics, innholders, and others by custom." The distinction is this, that a lien, when given by law, is merely a right to retain or keep possession of property until payment; but a pledge of property by way of security for a debt is a lien with a power of sale superadded. In *Lovett v. Brown*, 40 N. H. 511, it is held that a mechanic's or manufacturer's lien is neither a *jus ad rem*, nor a *jus in re*, but a simple right of retainer, personal to the party in whom it exists, and not assignable or attachable as personal property, or a chose in action, of the person entitled to it. The lien in such cases is a mere passive lien or right of retainer, and, although the retention of the property may be attended with expense, and may be of no benefit to either party, these considerations will not change the nature of the lien or the rights conferred by it. It is of the same nature as the lien of an attorney or solicitor on papers for his costs, which is a mere personal right, and one that can not be actively enforced, as the papers can not be sold or transferred,

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but can only be held as a security. *Bozon v. Bolland*, 4 Myl. & Cr. 354, (18 Eng. Ch., S. C.) Property held by a party in right of a lien can not form the subject matter of a sale by, or be taken on execution against, the lien holder. *Legg v. Evans*, 6 M. & W. 36; *Holly v. Huggeford*, *ubi supra*; *Kittredge v. Sumner*, 11 Pick. 50.

We regard it as well established by the authorities referred to that Whipple's right of lien was, while the property remained in his possession, a personal privilege which he could not sell or transfer except with the consent of the defendant, who was the general owner of the property; that possession was essential not only to the creation, but also to the continuance, of the lien; and that when Whipple parted with his dominion over the property, and suffered its locality to be changed, so as to put it out of his power to surrender it on demand to the general owner, on payment or tender of the price of manufacturing it, his right of lien was determined and forfeited. The transfer by Whipple of his right of lien to the plaintiff was consequently inoperative, and passed no right or interest in the property to the plaintiff. A different view of the law of the case having been taken by the county court in the instructions given to the jury, the judgment of that court in favor of the plaintiff is reversed, and a new trial granted.

C A S E S

ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF THE

STATE OF VERMONT,

FOR THE

COUNTY OF ESSEX,

AT THE

AUGUST TERM, 1861.

PRESENT:

HON. ASA O. ALDIS,	}	ASSISTANT JUDGES.
HON. JOHN PIERPOINT,		
HON. LOYAL C. KELLOGG,		
HON. ASAHIEL PECK,		

WILLIAM HOPKINS v. JEDEDIAH K. HAYWARD.

Audita Querela. Levy of Execution.

Audita Querela is an appropriate remedy to vacate and set aside the levy of an execution on real estate, when, through the fraud of the creditor, the officer has made a false return of the appraisal, and has consequently set off too much of the debtor's property, on the basis of the actual appraisal, to sat-

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isfy the execution or the amount which he returns as satisfied, when this irregularity does not appear upon the face of the officer's return.

Such a defect in a levy is not cured by the omission of both parties to bring a petition to the Supreme Court to vacate the levy, in accordance with sec. 49, chap. 46, p. 316 of the Compiled Statutes.

AUDITA QUERELA. The declaration is sufficiently set forth in the opinion of the court. The defendant demurred to the declaration, and the county court at the September term, 1860, ALDIS, J., presiding, adjudged the declaration insufficient, to which the plaintiff excepted.

Geo. N. Dale and Benton & Ray, for the plaintiff.

Burns & Fletcher and Wm. Heywood, for the defendant.

PECK, J. This is an *audita querela* to vacate and set aside a levy of an execution in favor of the defendant, Hayward, against the plaintiff, Hopkins, levied on the real estate of the said Hopkins. The question is as to the sufficiency of the declaration; the county court having decided on general demurrer, that the declaration was insufficient.

The declaration alleges that Hopkins owned an undivided half of the premises, which undivided half the appraisers on the execution appraised at \$1875, and that the officer set off one undivided third of such undivided half, subject to a mortgage on this undivided half on which was then due \$521.32, at the sum of \$451.23, in part satisfaction of the execution, alleging that this appears by the officer's return. For aught that appears from the declaration the levy upon the face of it was good. But one grievance complained of is, that after the premises were attached on the original writ in that suit, and before the levy of the execution, a house was built on the premises of the value of \$2000, and which was on the premises at the time of the levy, and that the appraisers by direction of the execution creditor, did not appraise the house, or take it into consideration, but appraised the land only in their appraisal, and that by direction of the creditor they did not appraise a homestead in the premises, but deducted \$500 from the value of the land for a homestead for the execution debtor. The declaration further alleges that the

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defendant knowing the facts, fraudulently procured the officer to return falsely, that the appraisers appraised the said whole undivided half of the premises at \$1875, when he knew that they appraised it without the house thereon at \$2375, and deducted \$500 therefrom as above stated for the plaintiff's homestead; and in like manner procured the officer to return falsely that he had levied on the plaintiff's equity of redemption in one undivided half of the whole farm, when he knew that the house and homestead were not included in the appraisal. Had the whole undivided half of the premises been appraised at \$1875, as the return of the officer indicates, the levy would be correct, since after deducting the mortgage the one third of it would be \$451,23, the amount levied. It is clear then, that if the facts alleged had appeared on the face of the officer's return, the levy would have been void, as it would then have appeared by the levy that the officer set off too great a proportion of the debtor's interest in the premises to satisfy the \$451,23 of the execution. It has been repeatedly decided that if it appears upon the face of the levy that too much of the debtor's property, on the basis of the appraisal, was set off to satisfy the execution or the amount the officer returns as satisfied thereby, the levy is invalid. The facts alleged and relied on to avoid this levy not appearing upon the face of the levy, and being in contradiction of the officer's returns, the levy could not be attached collaterally, but the remedy of the debtor, if any, is by *audita querela* or some other proceeding brought directly to vacate the levy. Such injustice cannot be without remedy, especially when done by the privity and procurement of the creditor.

The question then is whether *audita querela* is the appropriate remedy. It is insisted by the defendant's counsel that as the remedy by *audita querela* is a harsh remedy, it ought not to be extended beyond its legitimate and accustomed use, and that it is not the proper remedy for the grievance complained of in this case. We are not inclined to extend the writ of *audita querela* beyond its appropriate use, especially in a case where there is another remedy equally beneficial to the party aggrieved and less onerous to the other party; but we cannot in a case proper for its application according to settled principles of law, deny it. *Audita*

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querela is a judicial writ and is sometimes brought to vacate and set aside a judgment irregularly or fraudulently obtained, but its more common use is to prevent a wrongful and illegal use of an execution, or to redress a grievance already done by such wrongful and illegal use of final process. It is one mode by which the court exercises its power over its own process to prevent its abuse to the injury of the other party. Upon principle it would seem that it is a remedy adapted to the present case. It is laid down in the English elementary books that *audita querela* is the appropriate remedy to set aside an irregular extent on land, and it has often been so said by English judges, Roll. Ab. 305; 1 Com. Dig. (Aud. Quer. A.) p. 647. But we do not deem it necessary to go into an examination of the English decisions on this subject, as we have a decision in point in our own court that we are satisfied is in accordance with the principles applicable to this remedy. *Hurlbut v. Mayo*, 1 D. Chip. 387, is a full authority for sustaining this writ in a case like the present. In that case the levy was good on the face of it, but it was alleged that the appraisers appraised one piece of land, and that the officer returned a different piece of land as appraised and set off, of greater value than the piece actually appraised. The court on demurrer to the declaration vacated the levy. The court then say that they probably would have set aside the levy on motion, but hold that that is no reason why the party should not have his remedy by *audita querela*. Indeed it would seem that in a case like that and the one before us, where the levy is apparently good on the face of it, and the truth of the officer's return is to be litigated, the remedy should be by *audita querela*, so that the facts may be tried by jury. In some cases the party aggrieved has his election to seek his remedy by motion or by *audita querela*. In this case if the court should grant relief on motion the remedy would be equally severe as that afforded by *audita querela*, as the court could not on motion correct the error otherwise than by vacating the levy. But notwithstanding what is said in *Hurlbut v. Mayo*, it is doubtful whether the debtor in this case could have obtained relief by motion, if the facts are in dispute. Where a party is entitled to relief, the English courts are quite as much in the habit of granting it on motion as our

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own; and the rule there is, that where one has cause of relief which is not matter of fact that need be tried, the court usually helps him on motion, without putting him to his *audita querela*; but if there is doubt as to the facts, the court will not relieve on motion, but leave the party to his *audita querela*. 1 Com. Dig. 650; *Wicket et al v. Oreamer*, 1 Salk. 264; 1 L. Ray. 439; *Mitford v. Cordwell*, 2 Str. 1198. Besides, the execution debtor might in cases of this kind, suffer damages which he could not recover by motion.

It is claimed by the defendant's counsel that the plaintiff ought to be restricted to a suit against the officer for a false return. But in a case where the debtor's property has been illegally taken by setting off too great a portion of it to satisfy the execution, he ought not to be driven to that remedy, and to be compelled to take a compensation for his property. He is entitled to a specific remedy, by which he may have restored to him what has been thus illegally taken. Even if the creditor had no agency in procuring the false return, it is more reasonable that he should resort to the officer who acted under his employment, than that the debtor should be obliged to seek that remedy. In this case where the debtor directed the wrongful acts complained of, it certainly is not just to allow him to reap the fruits of his own wrong, and compel the debtor to seek his remedy on the officer who is no more in fault than the creditor, and who is not benefited by the act. The debtor is clearly entitled to a remedy that will restore to him the estate itself, at least to the extent that it has been wrongfully taken, even if it vacates the whole levy as this remedy necessarily does. We see no reason to question the authority of *Hurlbut v. Mayo*, and that case must govern this.

Nor is this levy cured by the statute of 1837, incorporated into the Comp. Stat. p. 316, on the subject of defective levies, which has not escaped our attention although not referred to in argument. This statute, which was not in force at the time of the decision of *Hurlbut v. Mayo*, gives the supreme court, on petition of either party, power to vacate a levy which may be "irregular, informal or not made according to the strict rules of law, so that the title derived therefrom shall be doubtful," if such petition shall be brought within two years from the time

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the extent shall have been returned, and due notice thereof to the adverse party ; and provides that if neither party bring such petition within the two years thus limited, then such extent shall be deemed good and valid.

The two years had not expired in this case when the suit was commenced ; still if that statute applies to this case in all its provisions, it might have been a good answer to this action so far as it seeks to vacate the levy. That statute was intended to apply to formal defects, but not intended to cure by lapse of time a levy like this, defective in substance as to the *subject matter* of the levy, by which gross injustice is done by taking too much of the debtor's land to satisfy the execution. The debtor in such case might have notice of the levy, good on the face of it, and yet be ignorant of the facts which constituted the error until after the expiration of the two years ; and we cannot believe it to have been the intention of the Legislature to deprive the debtor in a case like this of all remedy, if he omitted to bring his petition under that statute in two years after notice of the levy. This is substantially the construction the court adopted in *Bell v. Roberts*, 13 Vt. 582, although the court held that the defect in that case was of that formal character that came within the statute.

As to the other question, whether all the appraisers must agree in the appraisal, or whether the majority should govern, we express no opinion.

The judgment of the county court is reversed, and the defendant on motion has leave to plead on the usual terms of paying costs and taking none pending the demurrer, and the cause is remanded to the county court.

Merrill v. Blodgett.

SHERBURNE R. MERRILL AND IRA H. RAMSEY v. ZILPHA E. BLODGETT.

Evidence. License.

The defendant conveyed certain land to the plaintiffs in July, after which, as her evidence tended to prove, she remained in the sole possession thereof till October, during which time she cultivated the land and harvested the crops. Her evidence further tended to prove that the plaintiffs lived in the neighborhood and admitted her right to remain in possession and take the crops. In October the plaintiffs sued the defendant in trespass *qu. cl.* and for taking away the crops. *Held*, that in addition to, and connection with, the foregoing evidence it was competent for the defendant to prove that previous to, and at the time of the execution of her deed to the plaintiffs, it was verbally understood and agreed by them that she should remain in possession during the remainder of the season and have the crops.

This was an action of trespass *quare clausum* and *de bonis apostatis*. The defendant pleaded the general issue and it was agreed by the plaintiffs that the defendant might under said plea give evidence of any legal defence. The cause was tried by jury at the March term, 1861, POLAND, CH. J., presiding. The plaintiffs read in evidence a deed from the defendant as administratrix of her late husband, Milo B. Blodgett, to the plaintiffs of the premises in question, dated July 13, 1859.

The plaintiffs then gave evidence that the defendant after the date of this deed continued in the possession of the premises conveyed during the summer and fall of 1859, and cut and took away the crops growing thereon at the date of her deed to the plaintiffs.

The defendant claimed that she so continued in possession of said premises and in the use of them, and harvested and took the crops growing thereon by the assent and agreement of the plaintiffs, and gave evidence tending to prove that the plaintiffs, who lived in the immediate vicinity of said premises, never made any objection whatever to her doing so until about the time of commencing this suit, (Oct. 4th, 1859) and that the plaintiff, Ramsey, who had the principal management of the matter for the plaintiffs, distinctly admitted her right to remain in possession and take said crops, and endeavored to purchase of her a portion of them. The defendant then offered to prove that said premises

Merrill v. Blodgett.

were sold by her as administratrix on the 16th day of June, 1857, at public auction, and were bid off by the plaintiffs, that at the sale it was distinctly and publicly announced that the use of the said premises for that season and the crops then growing thereon were reserved by the defendant, and that afterward on the 13th day of July, when she executed the deed to the plaintiffs, it was fully understood and agreed that she was to have the use of the premises and the crops for the current year. The plaintiffs objected to this evidence on the ground that it contradicted and varied the legal terms of the deed, but the court admitted the evidence for the purpose hereinafter stated, to which the plaintiffs excepted.

The plaintiffs' evidence tended to disprove that the use of the place and crops was so reserved by the defendant, either at the sale of the farm or when the deed was made.

The court told the jury that the defendant's deed to the plaintiffs conveyed the premises with the right to immediate possession and to the crops then growing thereon, and that the same could not be controlled or varied by evidence of a parol agreement that the defendant should have the crops prior to, or at the date of the deed, but that if they found such was the understanding and agreement when the place was sold, and when the deed was given, and that the defendant remained in possession and took the crops without objection by the plaintiffs, they might regard this evidence as tending to establish that this possession and taking of crops was with the assent, and by the permission of the plaintiffs. No exceptions were taken to the charge—the jury returned a verdict for the defendant.

William Haywood and Benton & Ray, for the plaintiffs.

George N. Dale and W. S. Ladd, for the defendant.

ALDIS, J. The court admitted the evidence—not to contradict or vary the legal construction of the deed. On the contrary the jury were told that such parol agreement between the parties could not have that effect; that by the deed the plaintiffs had the legal title to possession of the farm and to the crops.

Merrill v. Blodgett.

But the evidence was admitted as tending to show, in connection with the other evidence in the case, that the defendant's possession of the farm and use of the crops were by the license and assent of the plaintiffs.

The defendant's evidence proved that she remained in possession of the farm from July till October,—almost the entire season for cultivating the land,—that she cultivated and harvested the crops and had the exclusive use of the farm—that the plaintiffs lived in the immediate vicinity, knew what she was doing, never made any objection till about the time this suit was brought, (in October), and admitted her right to remain in possession and take the crops, and proposed to buy a part of the hay of her. This it is admitted tends to show the assent and license of the plaintiffs to the acts now claimed by them to be torts.

We think proof, that the plaintiffs at the time they took their deed of the defendant, agreed that she might so remain and take the crops, tends strongly to show their assent to such her subsequent acts and strengthens materially the other evidence to establish their assent.

It does not seem to us that it is material to show that such assent or license was given after the deed was made. If given before, and in contemplation of obtaining the title, it operates to justify the party who, in faith of it, acts upon it. The party who gives the license, or makes the agreement which in law operates as a license, may perhaps revoke it—if he revoke before the other has acted upon it so far as to make a revocation of it unjust. But if he does not revoke and the other with his knowledge acts under it, the acts so done are clearly justifiable under the agreement or assent so given to them. Clearly the agreement may well be proved—not as being in conflict with his rights as owner under the deed, but as being consistent with such rights, and an act done in the exercise of them and in contemplation of their accruing. This was the view taken by the county court, and we think was right. The authorities cited by the plaintiffs' counsel only establish the position which the court below fully recognized, that the plaintiffs had by the deed the legal title to the crops.

Judgment affirmed.

CASES
ARGUED AND DETERMINED
IN THE
SUPREME COURT
OF THE
STATE OF VERMONT,
AT THE
GENERAL TERM
HELD AT
MONTPELIER, NOVEMBER, 1861.

PRESENT:

HON. LUKE P. POLAND, CHIEF JUDGE.

HON. ASA O. ALDIS,	}	ASSISTANT JUDGES.
HON. JOHN PIERPOINT,		
HON. JAMES BARRETT,		
HON. LOYAL C. KELLOGG,		
HON. ASAHIEL PECK,		

Eldridge v. Smith et als.

JOHN S. ELDRIDGE V. JOHN SMITH AND OTHERS.

[IN CHANCERY.]

Jurisdiction of Courts of Equity. Trustee. Railroads. Eminent Domain. Franchise. Mortgage.

When one owns and is in possession of land, over his title to which there is a cloud by reason of a claim of title on the part of others, a court of equity has jurisdiction, upon a bill for that purpose, to remove such claim, and to relieve the orator's title from the cloud.

One to whom certain property has been conveyed by his debtor, in trust for other parties, is not, by the obligation of his trust, precluded from purchasing or levying upon other property of the debtor for his own personal benefit.

The mortgage by a Railroad Company of its road and appurtenances, and its franchise, as a security for debt, does not convey its corporate existence or its general corporate powers, but only the franchise necessary to make the conveyance productive and beneficial to the grantees, to maintain and manage the railroad, and receive the tolls and profits thereof for their own benefit.

The Vermont Central Railroad Company, for the purpose of securing the payment of its bonds, conveyed in trust and mortgage to certain persons their "railroad and franchise, and, also, all the station houses, engine houses, etc., and other appendages, with all the lands thereto belonging and intended for the use and accommodation of said road:"

Held, That only such land of the Company passed by this conveyance, as was so connected with, and used by the company for, the railroad, that they would have been authorized to take it compulsorily under the provisions of their charter; and that, if it was so connected and used, it was immaterial whether it actually was taken by proceedings *in invitum*, or purchased by the company.

Held, also, That the words in the conveyance, "*intended for the use and accommodation of said road*," applied to the intention of the company in respect to the use of the land at the time the mortgage was executed, and not to the original design of the company when they purchased it.

Held, That such mortgage conveyed the full and entire surveyed line of the railroad to its whole extent.

The manufacture of railroad cars is not so legitimately and necessarily connected with the management of a railroad, that the railroad company would be authorized by its charter to take lands compulsorily for the purpose of erecting such a manufactory thereon.

So, also, in respect to the erection of dwelling houses, to rent to the employees of the company.

Eldridge v. Smith et als.

Otherwise, as to land taken for piling the wood and lumber used on the road, and brought to it to be transported thereon.

When land is taken for a legitimate railroad use within the scope of its charter by a railroad company, the judgment of the locating officers of the company is conclusive as to the quantity required for that purpose, unless the quantity taken is clearly beyond any just necessity.

The bill set forth, that at the December Term, 1855, of the Windsor County Court, the orator recovered a judgment against the Vermont Central Railroad Company for \$59,085.70, damages and cost; that he took out an execution thereon, and on the 14th of May, 1856, caused the same to be duly levied on certain lands belonging to that corporation, situated in Burlington, Northfield, Bolton, Waterbury, Essex, Middlesex, Windsor, and Richmond, which were severally described in the bill; that the Railroad Company did not redeem the lands so levied upon within six months from the date of the levy, and that the title thereto became absolute in the orator; that on the 20th of October, 1851, the Vermont Central Railroad Company conveyed its railroad franchise and certain other property to certain persons and their successors, in trust and mortgage, to secure the payment of the first mortgage bonds of that company, using, in the description of the property therein conveyed, the following words: "The railroad and franchise, called the Vermont Central Railroad, as the same is located, constructed, and improved by said company, extending from Windsor, in the county of Windsor, to Burlington, in said State, and also all the station houses, engine houses, shops, woodhouses, iron, sleepers, and other appendages, with all the land thereto belonging and intended for the use and accommodation of said road, as they now are, and as they may be, if repaired and improved, together with all the locomotive engines, passenger, freight, dirt, hand, and other cars, and all the other personal property belonging to said company, as the same is now in use by said company, or as the same may be hereafter changed or renewed by said company;" that the said Railroad Company, on the 20th of May, 1852, conveyed the real estate and property last above described, and by the same general words of description, to certain other persons and their successors, in trust and mortgage, to secure the payment of the second mortgage bonds of

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that corporation; that the lands levied on by the orator were not, at the time of the execution of said mortgages, used by said railroad company for the accommodation of the business of said road, that they had not been since used and were not purchased for that purpose, and that they are not embraced in said mortgages, but that the trustees under said mortgages claim otherwise, and claim that the orator should pay rent to them therefor, and that thereby, and by reason of the loose language of said mortgages, a dark cloud was produced upon the orator's title to such land, which greatly embarrassed him in the possession, enjoyment, and sale of the same. The bill prayed that the orator might hold and enjoy the premises so levied upon, free and clear of any claim of the trustees under said mortgages in law or equity, and that said trustees might be decreed to release and quit claim all right and title to said lands, and that they should be perpetually enjoined from setting up any claim thereto, and for further relief, etc. The trustees under the first mortgage, described in the bill, and certain bondholders who were made parties to the bill by order of the Court, made answers, the purport of which is sufficiently stated in the opinion of the Court.

These answers were traversed and the cause was referred to a special master, to ascertain and report what parts of the lands in question were occupied by the Vermont Central Railroad Company, and for what purpose, at the date of the said mortgages, and at the time of the orator's levy, respectively, and whether the parts so occupied were necessary for the use and accommodation of said railroad; and if so, what portions, and at what times, and for what particular purposes.

The master reported that he personally inspected the various pieces of land in question, and heard testimony from the parties in reference to the matters referred to him, and he made report of his finding in relation to the several pieces of lands, which it does not become material to recite, the facts in reference thereto being sufficiently stated in the opinion of the Court.

In the Court below, PECK, Chancellor, *pro forma* dismissed the bill with costs, from which decree the orator appealed.

Andrew Tracy and Jeremiah French, for the orator.

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Levi Underwood, for the trustees under the first mortgage.

Timothy P. Redfield, for certain bond-holders.

POLAND, Ch. J. The object of the orator's bill is to ascertain whether the defendants, who are trustees under the two mortgages executed by the Vermont Central Railroad Company, have any valid claim to the lands, or any of them, upon which he has levied his execution; and if they have not, that their claim of title under said mortgages may be removed, as a cloud upon his title, operating to his prejudice and injury.

The orator, being in possession of the lands thus levied upon, cannot himself institute any action at law to settle the title, and the defendants, though setting up a claim to the lands, have brought no suit against him, and have shown no intention to do so.

The bond-holders, who have been made defendants, and have filed an answer, set up therein, that the orator's bill shows no proper ground for the interference and jurisdiction of the court of chancery, for the reason that the orator has an adequate remedy in a court of law; but this objection has not been urged in the argument before us, and, in our opinion, cannot be successfully maintained. The jurisdiction of a court of equity in such case has been fully recognized in this State in accordance with the authorities on the subject cited by the orator's counsel.—*Hodges v. Griggs & Thrall*, 21 Vt. 280.

The answer of the bond-holders also alleges that the orator's judgment against the Vermont Central Company was obtained by fraud, and without any just debt to sustain it, and professes to give a circumstantial history of the fraud. If the orator's execution was not levied upon any property, which the bond-holders are entitled to hold under the mortgage to their trustees, it is not apparent to us how they can be permitted to question the validity of the judgment.

If the orator's levy covers any lands which are really included in the mortgage, it is subsequent thereto, and it is not claimed they can be held under the levy against the mortgage title.

It would seem, therefore, that this is a question wholly immaterial to the determination of the rights of these parties; but if

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it were otherwise, this part of the case is easily disposed of, upon the ground that the case does not furnish the slightest evidence to establish what is alleged against the validity of the orator's judgment. The answer, in this respect, is not responsive to the bill, but sets up an independent substantive matter, the proof of which is cast upon the bond-holders.

The answer of the bond-holders, in a vague, uncertain manner, seems intended to raise a question, which has been made in argument by their counsel, that the orator's levy is invalid, because, at the time his levy was made, he was one of the trustees under the mortgage, and bound to guard and protect the trust property for the bond-holders. The general principles advanced by the bond-holder's counsel, in respect to the duties of trustees, as to trust property, that they cannot become purchasers of it, or take it in execution upon their own debts, and that they should maintain the title against adverse claimants, etc., are all unquestionable. But this seems a mere "begging the question." If the orator had a debt against the Railroad Company, and the Company owned property which was not included in the trust mortgage, it is impossible for us to see why he had not the same right to appropriate it, in payment of his debt, as any other creditor. It would be singular, if, in such case, he must stand by and see the property retained by the Company, or taken by some other creditor, because he was a trustee of other property.

The propriety of his conduct, as well as the validity of his levy, stand on the same question: "Were these lands included in the trust mortgage?"

The question, made in argument by the counsel for the bond-holders, that these lands are covered by the prior mortgage to the Vermont & Canada Co., and that, being released by that Company to the orator, the defendants are entitled to be substituted in their place, and to set up their rights, is not made by the pleadings, nor supported by any proof.

This brings us to the main point in the case, and the only one made by the answer of the trustees under the mortgage, whether the lands levied on by the orator are covered by the mortgage from the Vermont Central Railroad Company to the trustees, executed on the 20th day of October, 1851.

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The property conveyed is thus described in the mortgage :—
“The railroad and franchise of said party of the first part, called the Vermont Central Railroad, as the same is located, constructed, and improved ; and as the same may be hereafter legally located, constructed, and improved by said company, extending from Windsor, in the State of Vermont, to Burlington, in said State ; and also the stations, engine houses, shops, wood-houses, iron, sleepers, and other appendages, with all the lands thereto belonging, and intended for the use and accommodation of said road, as they now are, and as they may be, if repaired and improved, together with all the locomotives, engines, passenger, freight, dirt, hand, and other cars, and all the other personal property belonging to said company, as the same is now in use by said company, or as the same may be heretofore changed or renewed by said company.” The first ground taken by the defendants is, that this mortgage, being of the *franchise* of the corporation, therefore, all property owned by them, whether connected with the railroad or not, passes under the deed, though not covered by the language of the description ; that, inasmuch as a corporation cannot hold property, except by virtue of, and in the exercise of, its franchises, a conveyance of its franchise passes all its right to hold property. If this is the true view of the nature and effect of this conveyance, then upon breach of the condition of the mortgage, the corporation executing it came to an end, or its existence is merged in, or devolved upon, the mortgagees.

But, in our judgment, neither the Legislature nor the parties contemplated any such consequences from the mortgage of a railroad, and it does not become necessary to give it a construction or effect involving any such result.

Corporations, created by act of the Legislature, are clothed with a variety of privileges and powers, more or less extensive, depending upon the terms of their charters, which are termed franchises.

It is said that one of the franchises of all corporations is the power of being a body politic, corporate existence, with rights of succession of members. Another is its right of representation in court by its corporate name, either as plaintiff or defend-

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ant. It has a general power, also, of acquiring, holding, and conveying property. In addition to these general corporate powers, this company was invested by the Legislature with a power to build a railroad between certain points, and to operate and manage the same, and take tolls and fares on the same for their own benefit and profit; and, to the extent of the proper necessities of the road, were authorized to exercise the sovereign power of the State to sequester private property without the consent of the owners, by making compensation therefor.

When a railroad company mortgages its road and appurtenances as a security for debt, and also its franchise, it is not to be understood as conveying its corporate existence, or its general corporate powers, but only the franchise necessary to make the conveyance productive and beneficial to the grantees, to maintain and support, manage and operate the railroad, and receive the tolls and profits thereof for their own benefit.

If it were held that all the corporate franchises, including the power of corporate existence, were conveyed by the mortgage, the conclusion would seem to be logical, that, on breach and foreclosure, the mortgagees would step into the shoes of the company and merely succeed to their rights in the property, and also to their corporate liabilities—a result by no means favorable to their interest. Or, if it were held that the mortgagees did not succeed to the corporate existence and functions of the Railroad Company, and that they did not remain in the company, then it must operate as a dissolution of the company, and lands taken compulsorily for their road, would revert to the owners in fee.

The construction we give the mortgage, relieves the case and the parties from the serious embarrassments which would arise from such a construction as the defendants claim for it, and leaves us to find what was really conveyed by the deed by the terms used in the description of the property.

The principal subject of the conveyance is the Vermont Central Railroad, and the language which follows is evidently designed to be merely a full description of the appurtenances and equipment of the road, and not words of enlargement to include more than belonged properly to it, and do not extend the conveyance, in fact, beyond what would be included in it by a

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conveyance of the railroad, appurtenances, and equipment. The particular words, having reference to lands, are, "All lands thereto belonging, and intended for the use and accommodation of said road." The words, *thereto belonging*, refer not to the company, but to the railroad; and this is made the more clear and distinct by the words which follow, "*intended for the use and accommodation of said road*," and, taken in connection with the object and principal subject of the grant, make it clear that it was not understood that any and all lands the company might own were conveyed, but only such as were connected with and properly formed a part of the railroad or its appurtenants.

Railroad companies in this State, by their charters, and by the general statutes of the State, are authorized to take all lands necessary for the construction and maintenance of their roads, and the convenient accommodation of the same, for procuring stone or gravel for the same, for depot accommodations, and for water for the use of the road, without the consent of the owners, by paying the appraised value thereof.

The charter of the Vermont Central Company provides that "the stock, property and effects of the company shall be exempt from all taxes levied by or under the authority of this State."—In the case of *The Vt. Central R. R. Co. v. Burlington*, 28 Vt. 193, the question arose, whether lands owned by the company, but not taken or used for railroad purposes, so that the company would have been authorized to take them by proceedings *in invitum*, were exempt from taxation; and it was held that they were not. Some of the very lands now in controversy in this case, we understand to have formed the subject of the litigation in that case. Similar decisions have been made in Massachusetts, New Jersey, and Pennsylvania, as shown in the opinion of ISHAM, J., in the case above cited. In *Seymour et. al. v. Can. & Niagara F. R. R. Co.*, 23 Barb. 284, a mortgage was executed of a railroad partly built; and it conveyed "the said railroad constructed, and to be constructed, together with all and singular the railways, rails, bridges, fences, privileges, rights, and real estate, now owned by said company, or which shall hereafter be owned by them." It was decided that the mortgage covered all such lands as were taken by the company for railroad purposes, which

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they could take by compulsory proceedings under their charter, but did not extend to lands owned by the company purchased for other purposes. The language of the mortgage is not more extensive than the language of the charter and of the railroad law, and by no means so broad as the clause exempting the company's property from taxation.

We are of the opinion, therefore, that the true test by which to determine whether any particular piece of the several parcels of land in dispute passed under the mortgage, is, whether it was so connected with, and used by, the company for the railroad, that they would have been authorized to take it compulsorily under the provisions of the charter.

It is not material of course, whether they did so obtain it, or by a purchase from the owner, but was it so situated that they would by law have been authorized to take it in that way? If so, then it would pass under the mortgage though obtained by purchase from the owner.

A question has been made in reference to some of the parcels of land which were originally purchased for legitimate railroad use, but where the purpose had been entirely abandoned before the execution of the mortgage; whether they are within the language of the mortgage, or "*intended for its use, &c.*"

The language, as we think, refers to the time when the deed was executed, and not to the original intent of the company when they purchased, and lands originally designed, when purchased, to be used for the road or for depots grounds, but which, by change of location, or otherwise, became unnecessary for that purpose, and the design was abandoned, would not pass, while, on the other hand, lands properly appropriated to the use of the road, at the time of the mortgage, would pass, though not originally purchased for such purpose.

What has been said is sufficient to indicate our general views as to the rights of the orator under his levy, and the trustees under the mortgage, that the trustees are entitled by virtue of their mortgage, to hold all lands then taken and used for the road-bed or track, depot or station grounds, shops, freight houses, wood houses and yards, side tracks and turnouts, or any other kindred purpose, but that lands owned by the company not

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appropriated to such purpose would not pass, but would be held by the orator under his levy. In applying these principles to the various parcels of land in question, in the first place, the trustees are entitled to hold under their mortgage, the full and entire surveyed line of rail road to its full extent, and wherever any of the orator's levies include any land within the surveyed limits of the road, as finally located, to that extent his levy must yield to the mortgage title.

The most important question as to amount, arises upon the parcel No. 3, in the Northfield factory property. It seems this was purchased by the company for the purpose of establishing a manufactory of cars, and that it was used for that purpose for a while, but abandoned before the date of the mortgage to the trustees. The works for *burnetizing* wood were not placed thereon till long after the date of the mortgage, nor were they in contemplation at the time.

Is an establishment for the manufacture of railroad cars a legitimate railroad purpose, so that the company would have a right to take land for it against the will of the owner? The defendants say, that as the company must necessarily have cars in order to carry on their business, therefore they must have the right to manufacture them, and have works for that purpose. But this argument proves too much. Railroads must have iron, in great quantities, for their track and other purposes. Does this authorize them to take ore beds and lands for forges and foundries, and manufacture their own iron? They must have wood, sleepers, and timber for depots, and large quantities of lumber of various kinds. Does this authorize them to take timbered lands, and sites for mills, against the will of the owners?

They must have glass, nails, paints, and many other things. Can they by compulsory measures provide themselves the means to manufacture them all? We think it very clear they cannot. If the company must manufacture their own cars or go without, then, doubtless, their manufacture would be regarded as a necessity of the railroad, but the manufacture of cars and engines is a distinct branch of mechanical industry, carried on wholly independent of any connection with railroads, and is a branch of business in which railroad companies do not usually engage at all; and in

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this case it seems to have been quickly demonstrated, that it was better to rely on supplying themselves with cars by purchase from those whose legitimate business it was to make them.

Although railroad companies must have engines and cars, iron, lumber, wood, and many other things in large quantities, in order to build and operate their roads, it is supposed they can supply themselves as private persons do, by purchase in the ordinary way, and they are not created or designed to be independent of all other branches of industry and business in the country, but to be additional aids to their successful development. The companies must have shops for the repair of cars and engines, as they are so often needed, and as they cannot well be moved for repairs, nor can facilities be found for repairs in the country generally, but the company were already supplied with all necessary accommodations for repairs. We are of opinion that an establishment for the manufacture of cars is not a legitimate railroad necessity, so that the company could properly condemn land on which to erect one.

But however this may be, this purpose had been entirely abandoned at the time this mortgage was given, and we think the land which had been bought for that purpose, was not then connected in any way with the road, or intended for its use and accommodation, so as to be embraced by the description in the mortgage.

We are of the opinion that the erection of dwelling houses to rent to their employees, is not so for the use and accommodation of the railroad, as to authorize the seizure of land upon which to erect them, under any circumstances.

The master reports that part of lot No 7, in Northfield, and lot No. 1, in Middlesex, have ever been used for piling wood, and are necessary for that purpose. This is a purpose for which the company have the right to take lands, and to the extent lands were used for that object, at the date of the mortgage, the mortgagees would be entitled to hold them.

In relation to lot No. 1, at Waterbury, it appears from the master's report, that it has ever been used by the company for the purpose of piling wood and lumber thereon, and was so at the date of the mortgage to the trustees, though the master

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reports that he finds they have sufficient space besides this lot for that purpose, if economically used. An examination of the evidence in the cause, and that taken before the master, and the diagram of the engineer, employed by the master, of the lands at that station, however, has led us to doubt very much, whether sufficient room is really left at that station, without this lot. But however that may be, it appears that this lot was before and at the time of the mortgage appropriated to their use by the company, and when land is taken for a legitimate railroad use by the railroad company, the judgment of the officers of the road, unless clearly beyond any just necessity, is regarded as conclusive. *Hill v. West. Vt. R. R. Co.*, 32 Vt. 68. We hold therefore that the orator is not entitled to this lot by virtue of his levy. The views before expressed sufficiently indicate our judgment, as to the various parcels of land covered by the levy, beside those that have been specifically named. 'The *pro forma* decree' of the chancellor is therefore reversed, and the case remanded to the court of chancery, with directions to enter a decree that the said trustees under said mortgages, within some time to be fixed by the chancellor, execute a deed of release and quit claim to the orator of all the lands covered by his levy. with the exceptions above indicated, which will be more fully noted in the formal mandate to that court.

As the trustees are acting in a *quasi* official character, and appear to have acted in good faith, and have prevailed in part, no costs will be allowed to the orator against them. The bondholders who have been made defendants, are to be dismissed without cost.

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LAWRENCE BRAINERD AND OTHERS v. PECK & COLBY.

[IN CHANCERY.]

Construction of Railroad Mortgage as to subsequently-acquired property. Description.

The first mortgage of the Vermont Central Railroad and its appurtenances in the description of a portion of the property conveyed, contained the following words: "And all other personal property belonging to said company, as the same now is in use by said company, or as the same may be hereafter changed or renewed by said company:

Held, that these words did not embrace certain machinery for "*burnetizing*" ties and timber so as to render them more durable, which machinery was not in existence at the time of the mortgage and took the place of nothing that was therein specified, but was constructed by the railroad company as a new experiment after the execution of the mortgage.

In the conveyance of property acquired subsequently to the first mortgage, made by the Vermont Central Railroad Company to the trustees under that mortgage, on the 12th of May, 1854, the following words of description were used: All the articles of personal property acquired by the company since the date of the mortgage, consisting, among other things, of the following, to wit", and then followed an enumeration, by name, of several engines, and, by number, of several different kinds of cars: *Held*, that the general words were to be construed as referring to articles of the same nature and kind as those specifically named.

BILL IN CHANCERY. The question in this case concerned the owners of certain machinery for the purpose of "*burnetizing*" timber and ties, contained in a building at Northfield in the possession of the orators who were the trustees of the bondholders under the first mortgage of the Vermont Central Railroad, and at the time of bringing the bill in the possession and management of that road, as such trustees.

The bill set forth the execution by the Railroad Company of said mortgage, on the 20th of October, 1851, in which the following words of description of the property conveyed were used: "The railroad and franchise of said Vermont Central Railroad Company, as the same is now located, constructed and improved, and as the same may be hereafter legally located, constructed and improved by said Company, extending from Windsor in the State of Vermont, to Burlington in said State; and

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also the stations, engine-houses, shops, wood-houses, iron, sleepers, and other appendages, with all the lands thereto belonging and intended for the use and accomodation of said road, as they now are, and as they may be if repaired and improved, together with all the locomotives, engines, passenger, freight, dirt, hand, and other cars, and all other personal property belonging to said Company, as the same now is in use by said Company, or as the same may be hereafter changed or renewed by said Company ;" that on the 28th of June, 1852, the trustees under that mortgage entered into possession by deed of surrender from the railroad company, of all the property described in said mortgage, and have ever since had the possession and control thereof ; that afterwards the company acquired other property, including the particular machinery in question, which was purchased for the purpose of preparing ties and bridge timber used upon said road so as to prevent them from decaying, and which consisted of an iron cylinder, a vat, a set of pumps, and a carriage ; that on the 12th of May, 1854, the said company executed a conveyance unto the trustees under the first mortgage which recited the substance of that mortgage and stated that "the personal property existing at the date of the mortgage had become diminished and impaired by use, and other personal property acquired, which had gone into the possession of the trustees, and this deed is executed to carry into effect the mortgage." It then proceeded to convey " all the articles of personal property acquired by the company since the date of the mortgage, consisting, among other things, of the following, to wit : " and then enumerated by name several engines, and by number several different kinds of cars. In one of the recitals of this deed, the property conveyed was spoken of as "being now in the possession of the said trustees, and now used and enjoyed by them."

The bill further stated that at the September Term, 1856, of the Washington County Court, the defendant, Colby, recovered a judgment against the Vermont Central Railroad Company, and took out execution thereon, which was levied upon the machinery in question as the property of that company ; that that machinery was afterwards sold at auction by the officer upon such execution, and purchased by the defendants, who were

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threatening to remove the same from the orators' possession. The bill claimed that the orators, under the mortgage and above mentioned deed of May 12th, 1854, acquired a good and perfect title to this machinery, and prayed for an injunction upon the defendants against any attempt to remove or control the same.

From the defendants' answer, and the testimony taken in the case it appeared that the machinery in question was constructed by the Vermont Central Railroad Company after the execution of the mortgage of Oct. 20th, 1851, and some time in 1852 or 1853. It was contained in a building which had been purchased by the company previous to the execution of the mortgage, and which, with the land on which it stood, was held in the preceding case of *Eldridge v. Smith et al.*, not to be included in the mortgage. Immediately after the construction of this machinery, it was placed in the possession of one Rogers, under a contract made by him with the company to furnish "burnetized" ties and timber to them for a series of years, and it continued in his possession under that contract until August, 1854, when he gave up his contract and the orators took possession of the machinery and held it until the defendants purchased it on the execution sale as set forth in the bill.

At the March term, 1861, in Washington County, Barrett, Chancellor, ordered the bill to be dismissed with costs, from which decree the orators appealed.

Levi Underwood, for the orators.

The defendants, *pro se*.

POLAND, Ch. J.—The orators claim to hold the "burnetizing works or machinery" attached and sold by the defendants on their execution against the Vermont Central Railroad Company, by virtue of the mortgage deed of Oct. 20, 1851, by said Company to their predecessors as trustees, and the deed of subsequently acquired property, from said company to said trustees, dated May 12, 1854.

The single question in the case is, whether the orators have a valid title under either, or both, of said deeds.

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There seems to be no controversy as to the facts about the history of the property. These works were erected by the Vermont Central Railroad Company after the date of the railroad mortgage in 1851, either in 1852 or 1853, and were immediately taken possession of by Wm. Rogers under a contract with the railroad company, to furnish ties to them for a series of years; and Rogers continued in possession under this contract up to August 1854, which was subsequent to the date of the deed by the company of the after acquired property. After Rogers gave it up in 1854, the trustees who were then in possession of the road, had the possession, and used the works occasionally, till taken by the defendants. This property is conceded not to have been in existence when the mortgage was executed, in 1851, but the orators claim to hold it under a provision in that mortgage, as an incident or accumulation of the personal property conveyed by that mortgage. The mortgage after describing the personal property mortgaged, engines, cars, &c., proceeds as follows, "and all other personal property belonging to said company as the same now is in use by said company, or as the same may be hereafter changed or renewed by said company."

As a general principle, it is well settled that property not in existence at the time, cannot be conveyed, either absolutely or by way of pledge or mortgage; though such agreements have, to some extent, been upheld by courts of equity. In some cases, when the furniture and rolling stock of a railroad has been mortgaged, it has been held that the mortgagee's right was unaffected by those changes and renewals incident to that species of property, and though the different articles were to a considerable extent not the same as those existing at the date of the mortgage, still that it was in substance the same, and treated like the increase of animals, or the crops grown on land, as the natural growth and product of that which was mortgaged. But there is not great harmony in the cases on the subject.

But this *burnetizing machinery*, we think, cannot be brought within the terms of the mortgage. Nothing of the kind existed at the time in the property mortgaged, and this took the place of nothing that was covered by the mortgage. It was, in no proper sense, any part of the furniture or equipment of the road, nor

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was it substituted for any thing that was used upon the road, so that if the mortgage be held to cover new engines, or cars, or the like, procured to replace such as had been worn out, it could not be extended so as to embrace the property in question.

In *Pierce v. Emery*, 32 N. H. 484, cited by the orators' counsel, the act authorizing the mortgage expressly authorized the mortgage of subsequently acquired property.

The deed of subsequently acquired property of May 12, 1854, was apparently executed as a confirmation merely of the clause in the mortgage, that it should cover exchanged and renewed property. It recites the substance of the mortgage, and then goes on to recite, "that the personal property existing at the date of it, had become diminished and impaired by use, and other personal property acquired, which had gone into the possession of the trustees, that this deed is executed to carry into effect the mortgage."

Another reason why we think this deed of May 12, 1854, was not intended to embrace this apparatus is, that it is not mentioned, though the property is mostly particularly described. The deed is "of all the articles of personal property acquired by the company since the date of the mortgage, consisting, among other things, of the following, to wit:" and then enumerating by name several engines, and by number, several different kinds of cars. By the ordinary rule of construction, in such cases, when there is a special enumeration of particular articles, and also general words used, the general words refer to articles of the same nature and kind, as those specifically named.

If it had been intended to convey this burnetizing machinery by this deed, it is quite singular that standing by itself, disconnected from the general stock and equipment of the road, and both so bulky and expensive, it should not have been specifically named.

But what satisfies us fully that it was not intended to be, and was not, conveyed by this deed is, that the deed describes the property subsequently acquired, which the deed conveys, as "being now in the possession of the said parties of the second

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part and now used and enjoyed by them" and in one of the recitals in the deed, the newly acquired property is thus spoken of, "which said property has from time to time as acquired by said company, been put into possession of said trustees for the better management, &c." Now, as before stated, this machinery at that time had never been in the hands or possession of the trustees at all, but was then, and continued for some time to remain, in the possession of Rogers, under a contract with the company, which was expected to continue for some years. This probably furnishes the real reason why they did not wish to convey it to the trustees.

We are all of opinion that neither by the mortgage of 1851, nor the subsequent deed of 1854, was any title conveyed to the orators to the property in question.

The decree of the chancellor dismissing the orators' bill is affirmed and the same is remanded to be perfected.

THE STATE OF VERMONT V. WILLIAM P. BRIGGS.

Forgery. Criminal Law. Indictment.

It is an indispensable element in the crime of forgery, that the forged paper must be such, that if genuine, it may injure another, and it must appear from the indictment that it is legally of such a character, either from a recital or description of the instrument itself, or, if that alone does not show it to be so, then by the additional averment of such extrinsic facts as render it of that character.

In the statute prohibiting the forgery of any "bond or writing obligatory," (General Statutes, Chap. 114, Sec. 1, p. 678) these words are used in their legal sense, as meaning bonds binding some obligor to some obligee, and requiring something to be done, which, if not done, can be compensated by an action on the bond.

Therefore, an indictment for forgery is not sufficient, which describes the forged instrument only as "a certain writing, purporting to be a bond, with condition thereto annexed, signed, sealed, and executed by A., B., and C., and dated Jan. 8th, 1858, with intent to injure and defraud the said A., B.,

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and C.," notwithstanding it also contains an averment that the bond cannot be more particularly described, because it is in the possession of the respondent.

INDICTMENT for forgery. The material portion of the indictment is sufficiently set forth in the opinion of the Court.

The respondent demurred to the indictment, but the County Court for Chittenden County, at the September Term, 1859, BENNETT, J., presiding, adjudged the indictment sufficient, to which the respondent excepted

Daniel Roberts and George F. Edmunds, for the respondent.

E. R. Hard, State's Attorney, for the prosecution. .

ALDIS, J. The indictment alleges that the respondent forged "a certain writing, purporting to be a bond, with a condition thereto annexed, signed, sealed, and executed by A. B. Cooper, Robert Russell, and Jos. Whipple, and dated Jan. 8, '53, with intent to injure and defraud the said Cooper, Russell, and Whipple;" and avers that the grand jurors can not more particularly describe the bond because it is in the possession of the respondent. Is this a sufficient averment of facts to constitute the crime of forgery?

It is a fundamental rule, in criminal pleadings, that all the material facts which constitute the crime, must be affirmatively alleged in the indictment.

It is not enough to charge a respondent with committing a crime generally; but the very acts done by the party, and all of them which are necessary to make a case of crime, must be specifically averred in the indictment. This is necessary, that the respondent may know precisely what the very acts are which he is charged with having done; that the jury may know what facts are to be proved; that the Court may know whether the alleged facts, if proved, will amount to crime; and that the defendant, if acquitted, may plead the verdict in bar of any future prosecution for the same acts.

Hence, in forgery, if the forged instrument can be had, it must be fully and particularly set forth, that the Court may know

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whether the paper can be the subject of a forgery. If it is in the possession of the respondent, so that the State can not so set it forth, then that fact must be stated, and the substance of the bond must be alleged with as much precision and fullness as possible. To determine whether the description of the bond in this indictment is sufficient, we must inquire, first, what are those material facts which must exist to constitute the crime of forgery? and secondly, are all of those facts alleged in this indictment? If not, it is bad. It is not the forging of every instrument in writing that constitutes the crime of forgery. The forged instrument must be such, that it may prejudice the right of another. Hence, it is laid down in all treatises on criminal law, that the counterfeiting of letters and writings, which are merely frivolous, of no moment, or from which no damage can ensue, is not a crime. On the other hand, the counterfeiting, with a fraudulent intent, of *any* writing whereby another may be prejudiced, is forgery. Hence, it is an indispensable element in the crime of forgery, that the forged paper must be such, that if genuine, it may injure another; and the paper must be so set forth in the indictment, that it shall appear that it is of that character, viz.: that it may injure another. Hence, all contracts, bonds, and instruments in writing, which create a legal liability from one person to another, that may be enforced at law, are properly the subjects of forgery. But when the instrument, on the face of it, appears to be, and, if genuine, would be void, it is not a crime to forge it. Thus, in *Regina v. Bartlett*, a well known case, and cited in all the elementary works in illustration of this principle, an order in these words, viz.:

"To G. PEEKFORD.—*Sir*: Please pay to *your* order the sum of £47 for value received. Signed,

"Accepted, G. PEEKFORD. J. BISHOP,"
and endorsed by J. Bishop, was held not to be a bill of exchange, or an instrument which could injure another. It was merely an order on another to pay himself a sum of money.

This general rule, that if the instrument is void on its face, it is no crime to forge it, is, however, subject to this limitation. When the paper on its face does not appear to have any legal validity or show that another might be injured by it, but extrin-

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sic facts exist, by which the holder of the paper might be enabled to defraud another, then such facts must be averred; and, if averred in the indictment, will constitute forgery.

Such is *Burke's case*, which is referred to by Judge Cowen, in *People v. Shell*, in illustrating this point. In this last case, (*People v. Shell*, 9 Cow. 778) Judge Cowen reviewed many of the cases bearing upon this point, and, after stating the general doctrine, "an instrument, purporting to be void on its face, and not shown by averment to be operative if genuine, is not the subject of forgery," says—"How is it possible, in the nature of things, that it should be otherwise? Void things are no things. Was it ever heard of that the forging of a *nudum pactum*, a thing which could not be declared upon or enforced in any way, is yet indictable? It is the forgery of a shadow."

If, therefore, the instrument forged must, either of itself or by averments connected with it, have legal validity—"must be the foundation of the liability of another," as it is sometimes expressed, it is obvious that this material fact—this indispensable element of forgery—must be averred in the indictment. If it do not appear in the indictment, that the paper alleged to be forged can have some legal operation to the injury of another, then one necessary ingredient in the offence of forgery is wanting, and the indictment is bad.

In the case at bar there is no allegation that the bond was executed to any person; that there was any obligee. Neither does it appear that the bond was for the payment of money, or for the performance of any act whatever, or that it created any legal obligation. If it were alleged to be for the payment of money from the obligors to some obligee, (even if unknown) or for the performance of any act which the obligors could be compelled to do, it would be forgery. Nothing is alleged in substance but that it is a bond—a bond with condition, nothing more. But there may be bonds wholly void—mere nude pacts—wholly frivolous, or so impossible or illegal that they could not, upon their very face, be enforced. It should appear affirmatively, that it is a bond which might have a legal operation. When, therefore, this indictment shows nothing as to the nature, extent, and character of the obligation imposed by the bond alleged to be forged, or

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even that there was anything whatever mentioned in it that could be the subject of a legal liability, it is clearly bare of an indispensable averment to constitute forgery. Every fact stated in it may be true, and yet there may be no forgery.

The Statute provides that every person who forges any "bond or writing obligatory" shall be punished, &c. But these words are used in their legal sense, as meaning bonds binding some obligor to some obligee, requiring something to be done which, if not done, can be compensated by an action on the bond. The Legislature did not intend to make it a crime to forge a bond which was a mere idle, frivolous, void paper, binding no one and hurting no one.

If nothing more was proved before the grand jury than is averred in the indictment, viz.: "a bond purporting to be executed by Cooper, Russell, and Whipple, at a certain date, with a condition to it," we are at a loss to perceive how they could find that there was an intent to defraud; for all this might exist without either the intent or the power to defraud any one. If more was, in fact, proved, it should have been averred.

In 2 Cow. 522, *The People v. Kingsley*, there is a precedent of an indictment upon a forged bond alleged to be in the possession of the respondent, and, therefore, not fully set forth. But in that form it is averred that the bond was for the payment of money, and the name of the obligee is stated. It may not be necessary to state the name of the obligee, or the sum of money to be paid, or the acts to be performed. These are the details which must be stated when the bond can be had, and which may be omitted when it can not be had. But it should appear from the indictment that there was an obligee as well as obligors, and that the bond purported to create a legal liability upon the obligors, or might operate to their prejudice, or to the injury of another. For the want of such necessary averments in this indictment, we all concur in the opinion that the judgment must be reversed, and the indictment quashed.

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SALLY AUSTIN v. THE TOWN OF BURLINGTON.

*Assumpsit. Promissory Notes. Attachment. Action. Towns.
Constable. Officer. Receipt. Execution.*

Whether an indorsee of a promissory note can maintain assumpsit upon the general money counts against a prior indorser, known to be an accommodation indorser when the note was negotiated, *quere*.

An action of general assumpsit was commenced by the indorsee of a promissory note against a prior accommodation indorser, and property was attached by a constable thereon. After the entry of the suit in court, the plaintiff filed an additional count to his declaration, declaring specially upon the note and indorsement, and obtained judgment upon such additional count only. *Held*, in an action against the town for the neglect of the constable to keep the property attached to respond to the execution (the plaintiff's attorney having proved by parol testimony, that the original declaration was made to recover solely upon the note described in the special count,) that the additional count did not introduce a new cause of action, and that the constable was not discharged from his obligation to the creditor to preserve the property attached to respond to the execution.

When it does not appear from the record that the new counts are for the same cause of action as the original declaration on the common counts in assumpsit, the burden of proof rests upon the party seeking to establish that they are for the same cause of action; and this may be shown by parol testimony.

The direction by an attorney of an attaching creditor to the officer holding the writ not to attach real estate, does not relieve the officer from liability for not keeping personal property, attached by him upon the same writ, to respond to the execution.

> The consent of the attorney of an attaching creditor that the officer may take receiptors for the property attached, given generally, and without naming any receiptors or giving any expression as to the responsibility of those to be taken, and a request to the officer that, before he removes the property attached, he will go to the debtor and see if he will furnish receiptors, do not release the officer from his official liability for the responsibility of the receiptors, in case he allows the property to go into their hands.

Where a constable, who had attached property upon mesne process, had removed from the State, it was held a sufficient demand of property attached to charge it upon the execution, to demand it of the selectmen and town agent of the town, and of one of the persons whose accountable receipt the constable had taken for the property.

> An attaching officer, who delivers the property attached to receiptors and takes their accountable receipt therefor, is not discharged from liability to have the property to respond to the execution, by the fact that the receiptors, when taken, were actually responsible, but afterwards became insolvent.

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CASE to recover of the defendant, for the default of one Taylor constable of the defendant town, in not keeping, so as to have forthcoming upon execution, certain flour attached by him, as constable, upon a writ in favor of the Bank of Malone against J. & J. H. Peck & Co., the demand upon which said writ was issued being the property of the plaintiff. The defendant pleaded the general issue, and a special plea that the suit of *Bank of Malone v. J. & J. H. Peck & Co.* was commenced solely as an action of general assumpsit, and the attachment in question was made thereunder, while in that form, and that afterwards the plaintiff in that action filed therein certain additional special counts to the original declaration, declaring against the Pecks as prior and remote indorsers of certain promissory notes therein described; that the judgment in that action was rendered solely on such special counts, and that the Pecks were merely accommodation indorsers upon said notes, and that the attachment by Taylor, described in the declaration, was not an actual taking thereof, but solely a formal and nominal attachment. The plaintiff replied that the additional counts named in the plea were for the identical causes of action for which the suit was commenced, and sought to be recovered for under the general counts. The defendant rejoined, denying this last allegation.

The cause was tried by jury, at the March term, 1860, in Chittenden County, KELLOGG, J., presiding.

The plaintiff put in evidence the writ in the suit of *The Bank of Malone v. J. & J. H. Peck & Co.*, dated August 4, 1854, with the return thereon by said Taylor, as constable, with the proceedings in said suit ending in a judgment in favor of the plaintiff therein, at March Term, 1856, of the Chittenden County Court.

The plaintiff proved that said Taylor, on and after the 4th day of August, 1854, down to the 23rd day of December, 1854, was constable of said town, and duly qualified as such, and that said writ in favor of the Bank of Malone, was, on the 5th day of August, 1854, put in his hands for service by Jacob Maeck, the attorney of the plaintiff therein, and that said Taylor made the return which is endorsed upon said writ.

The plaintiff further proved, that execution duly issued upon

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said judgment, dated April 7, 1856, and on the 21st of April, 1856, being within thirty days from the rendition of said judgment, was delivered to Samuel Huntington, then and thereafter, during the life of said execution, constable of said town, and duly qualified as such, for service and collection, who afterwards, viz: on the 5th day of May, 1856, returned said execution to the office of the Clerk of said Court, wholly unsatisfied, with the proper return endorsed of *nulla bona* in proper form.

The plaintiff introduced said Huntington as a witness, and he was allowed by the Court, against the objections of the defendant, to testify, and did testify, that Taylor, in the Spring of 1855, removed with his family from the town of Burlington to Detroit, Michigan, and had never since returned to this State; that he made no demand of Taylor for the property attached, nor had any communication with him; but that while he so held the execution in his hands, he called upon John Peck and Edward W. Peck, two of the debtors therein, and the only ones who resided in this State, and demanded of them the property attached and payment of the execution; and also at the same time, was informed by Jacob Maeck, the creditor's attorney, that Henry W. Catlin had receipted the property to Taylor, and he demanded the property attached, of Catlin; and also at the same time demanded said property of the selectmen of said town, informing these several parties that he held said execution for collection, and that he demanded said property by virtue thereof; and also at the same time, said Huntington made known to George F. Edmunds, then the agent of said town, to prosecute and defend suits in which said town was interested, that he held said execution for collection, and demanded the property of him. All this was done within thirty days after the rendition of said judgment. No other demand was attempted to be proved by the plaintiff.

Upon this point the defendant put in evidence, that the said Taylor, ever since his removal to Detroit, in the Spring of 1855, had resided there, and had a place of business there, and that it was generally known in Burlington from the time of his removal from this State, that he so resided in Detroit; and that the distance from Burlington to Detroit was about 650 miles, and required 36 hours travel from Burlington to reach Detroit.

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Upon this evidence, the defendant claimed that the property attached was not duly "taken in execution ;" but the Court held that this evidence, not being contradicted, did, if believed by the jury, prove a taking in execution of the property attached, sufficient to establish the plaintiff's case on this point.

The plaintiff proved by Jacob Maeck, against the objection of the defendant to the admission of the testimony, that the plaintiff's agent brought him the notes described in the defendant's special plea, on the 4th of August, 1854, with directions to bring a suit upon them against J. & J. H. Peck & Co., and that he accordingly made out the writ with the general counts in assumpsit only, and put it into Taylor's hands for service ; that he kept the notes after the writ was entered in court, that he filed specifications under the general counts, describing accurately the notes left with him by the plaintiff's agent, and which were the only notes or demands against J. & J. H. Peck & Co., which he had in favor of the Bank of Malone, and that afterwards he filed the special counts referred to in the defendant's plea ; and that the judgment was made up on these notes and on nothing else.

The defendant then offered to prove that J. & J. H. Peck & Co. were mere accommodation indorsers on said note and that this fact was known both to the Bank of Malone and the plaintiff, and was proved on the trial of the suit in favor of that Bank against them. The court excluded the testimony.

The defendant also offered in evidence the following deposition of said Taylor :

"I, S. W. Taylor, of Detroit, in the County of Wayne, and State of Michigan, of lawful age, depose and say, that I was acting as constable of Burlington, Vermont, in August, A. D., 1854. On or about the fifth day of August, A. D., 1854, I received a writ of Jacob Maeck, in the suit the Bank of Malone against John Peck, John H. Peck, and Edward W. Peck. Said Maeck was acting as the attorney of said Bank. Mr. Maeck then gave me a paper of which the following is a copy,"

"Mr. TAYLOR, Sir:—

My orders are to make immediate attachment. I can hardly think it necessary. But I agreed to pursue

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the order. John H. Peck is not at home. I wish you to go immediately to the Doctor and tell him what you want, and no doubt he will do the thing needful.

The debt is \$5000 and some little interest and costs. Make no unnecessary stir. If you want to see me, you will find me until about 9 o'clock at my room; after that time, at the Judge of Probate's office. As I agreed to send word whether all was done up right, please see me as soon as you conveniently can. They wanted both real and personal estate attached, but the Pecks do not desire an attachment of real estate to appear on the record, and they can get any security for personal estate. They consented the real estate need not be taken, if enough of personal was found.

Respectfully yours,

August 5th, 1854.

J. MAECK."

He further told me to go quietly to John Peck and tell him what I had in my hands and make no disturbance.

When Maeck brought me this writ, he told me that Mr. Austin, who gave him the notes upon which the suit was founded, wanted real and personal property attached; but he, Maeck, did not think it was necessary to attach real estate, and I need not do it. Maeck said he presumed Peck would give me a good receipt or would get receptors. I cannot tell which expression he used. From Maeck's conversation and what is said on the paper, I understood the phrase, "the thing needful," in the paper above recited, to mean that the Pecks would get good receptors.

In pursuance of such instructions, I served said writ by attaching two thousand barrels of flour as the property of the Pecks, and took an accountable receipt therefor in the usual form signed by H. W. Catlin and Wm. Wilkins, Jr. I did not make any disturbance, nor take possession of the flour. I did not see the flour. Catlin & Wilkins were then in good pecuniary standing and credit. They had real and personal property in their possession as owners at that time, to a much greater amount than the claim in said writ.

I had no knowledge, nor information, nor suspicions that Catlin & Wilkins were insolvent, or going to fail at that time, nor the firm of J. & J. H. Peck & Co.

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Soon after I made said attachment I saw said Maeck, and told him the attachment was made, and that I had got receiptors. Maeck did not find any fault or express any dissatisfaction with what I had done.

I have never taken the property so attached into my possession or control. Catlin & Wilkins failed suddenly, and I never had any opportunity to take possession of said property. And the Pecks also failed suddenly, and since their failure there has been no opportunity to my knowledge, to improve said security. Since I took said receipt, I have held it, and still hold it for the benefit of all parties concerned."

The defendant also offered to prove that town agent, while the execution v. J. & J. H. Peck & Co. in their favor of the Bank of Malone was in Huntington's hands for collection, procured of Taylor the receipt for the flour attached which he had taken as mentioned in this deposition, and in behalf of Taylor demanded of the signers of it within 30 days after the rendition of the judgment, the property therein described, and offered the receipt to Maeck as the plaintiff's attorney, and authorized him to use Taylor's name in any steps necessary to enforce it, at the same time informing Maeck that Taylor had written the town agent that the receipt had been taken by Maeck's directions. This Maeck then denied and declined to take the receipt. The defendant also offered to prove that at the time the writ was put into Taylor's hands for service and until October 10th, 1854, J. & J. H. Peck & Co. and Catlin and Wilkins were largely engaged in business in Burlington, were in good credit, had in their hands respectively unencumbered real and personal estate to many times the amount claimed in the writ, and that in taking the receipt Taylor used all the care and discretion that a cautious and prudent man engaged in like service could be expected to use.

But the court excluded Taylor's deposition, and all the evidence so offered, and, it being admitted by the defendant that said judgment and execution had never been paid, and that the flour attached by Taylor was of sufficient value to satisfy the amount due thereon, directed the jury to return a verdict for the plaintiff for the amount due on said execution, which was done,

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To the several rulings and directions of the court above recited the defendant excepted.

Roberts & Chittenden, for the defendant.

J. Maeck and E. J. Phelps, for the plaintiff.

ALDIS, J. The Bank of Malone sued J. & J. H. Peck & Co. The declaration contained only the money counts. The Bank's claim was as indorsee of two promissory notes, of which the Pecks were prior and remote indorsers. The indorsements were in blank. The Pecks were accommodation indorsers. In the County Court the plaintiff amended the declaration by adding special counts on the notes. The defendant, here sued for default of its constable, in not having the property attached on the writ forthcoming upon the execution, claims that the amendment dissolved the attachment by introducing a new cause of action.

That an indorsee may sue a prior and remote indorser, and recover on the money counts, would seem to be the tenor of modern decisions. 11 Pickg. 316; *Rushworth v. Moore*, 36 N. H. 188; *Johnson v. Callin*, 27 Vt. 87.

Whether this is true as against a mere accommodation endorser, known to be such when the note is negotiated, seems more doubtful. 14 Vt. 228; 27 Vt. 87; 7 Wheat. 35; 1 Denio 105. Though a party may not be able to recover against a surety on the count for money had and received, yet, on the count for money paid, it would seem as if the action ought to lie. Each indorser impliedly promises subsequent indorsers that he will pay the note if the maker does not, and that if any of them should be compelled to pay it, he will pay them back the money they so pay for him. Payment by the subsequent indorsees would seem clearly to be money paid for prior indorsee, and at his implied request. See 36 N. H. 188; 26 Vt. 19. Upon this point it is not necessary to pass, as we all concur in holding that the amendment, if necessary to enable the Bank of Malone to recover against the Pecks, was not the introduction of a new cause of action, so as to dissolve the attachment.

An attaching creditor has not, as against subsequent attach-

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ing creditors, receiptors or sureties, any right to amend his declaration so as to enhance his damages and increase his lien upon the property attached beyond the amount originally and really intended to be sued for. But so long as he acts in good faith and embraces in his new declaration only the original cause of action intended to be described, he may, without hazard to his security, correct by amendment all mere errors of form, of misdescription and of want of technicality. Officers and all others, who may become liable for the debtor, act with the knowledge that courts have this power of allowing amendments—that its exercise is highly useful in the administration of justice; and that their liabilities must be assumed subject to its reasonable application.

When the record substantially shows that the new counts are for the same identical cause of action as the old, no question can arise; but where the record does not show this, (as in this case,) and the new counts may embrace new causes of action, then the law, *prima facie*, presumes that the judgment does embrace new causes of action not embraced in the original declaration, and casts the burden of proof upon the plaintiff to show that in point of fact no new cause of action, no additional sum in damages has been included in the judgment. Nor is the plaintiff bound to show this by the files and records of the court. Parol evidence—the testimony of his attorney—is admissible for this purpose. The common counts contain no statement of the specific claims of the plaintiff. Without parol evidence, therefore, it is impossible to tell the amount of the claims for which the property attached will be held to respond, or what the specific claims are.

This subject has recently been before the Supreme Court of Massachusetts, in the case of *Wood v. Denny*, in the 7th Gray 540, and directly decided as above indicated.

In New Hampshire, *Laighton v. Lord*, 9 Foster 257, the question has been very carefully examined, and the court have held the same doctrine. The authorities have been so fully examined and carefully weighed in these two cases, and the reasoning and conclusions of the court are so satisfactory, that we deem a further reference to the adjudged cases superfluous.

The rule is also stated in Drake on Attachment in substantially the same way. Where the writer says, § 285—"If, however,

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such an intent " (the intent to include the amended claims in the original suit) " can not be inferred from the writ and declaration, the new counts will be considered to be for other and not for the original causes set forth," we understand him to mean that such is the *prima facie* presumption of the law, and thus casting the burden of proof on the plaintiff to repel the presumption. The language is taken from the opinion of Judge Putnam in *Fairfield v. Baldwin*, 12 Pick. 895, and should be construed with the light thrown upon that case by the remarks of Judge Fletcher in *Felton v. Wadsworth*, 7 Cush. 589, and by the more recent decision in *Wood v. Denny*.

II. Another question is, were the directions given by the plaintiff's attorney in regard to the attachment, such as would exonerate the officer from his official responsibility ?

In the leading case of *Strongs v. Bradley*, 14 Vt. 64, the letter of the creditor was construed—and that was its fair and natural meaning—to invest the officer with a discretion either to pursue the legal course or to omit it, as, in his judgment, he thought best. Nothing can be plainer, than that in such case the officer ought not to be held responsible for the strict performance of his official duty, for he is permitted by the creditor to forego it if he see fit.

To exonerate the officer from liability the directions given by the creditor must release the officer from pursuing the strict line of official duty, and authorize him to do something which he was not in law bound to do ; they must have influenced the conduct of the officer (though this is presumed where they have any such tendency, and it is for the creditor to rebut the presumption,) and the loss of the debt must result from his following such instructions, and not from his neglect or fault, when acting in the line of his legal duty. It is not every act of interference by the creditor, that wholly releases the officer thereafter from pursuing his official duty. Officers often act to some extent under the directions of the creditor in attaching property, and still in other respects, and subsequently in their acts in regard to the property attached, are liable strictly as officers. Thus, if the creditor direct the officer to attach certain personal property of the debtor, and not to attach real estate or any other personal property, it is clear that the officer would not be liable for neg-

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lect in omitting to attach the real estate or other personal property excluded by the creditor, even though the property attached should be wholly unproductive of security to the creditor. But if the property so attached belong to the debtor and is sufficient to secure the debt, and the officer by his neglect allows it to return to the possession of the debtor so that it is lost to the creditor, clearly for such neglect the officer should be held liable. Such direction exonerates the officer from attaching any other property than what the creditor specifies, but it does not exonerate him from attaching and safely keeping that. If he neglect safely to keep the property attached, he can not excuse his neglect by saying, that if not specially instructed to attach personal property he might have attached real estate. Assuming to attach personalty, he must have understood that he was acting as an officer, and would be held liable as such for the attachment he actually made and that he was exonerated only as to what he was directed not to take.

The direction in this case, not to attach real estate, exonerated him from not taking real estate ; but it did not release him from his liability as an officer for the two thousand barrels of flour which he did attach. It would be absurd to say that he understood because he was told not to attach realty, that he was therefore acting merely as the servant of the plaintiff in attaching and holding the flour, and that his official responsibility as constable was ended. In *Howes v. Spicer*, 23 Vt. 508, the creditor directed the officer to attach fifty kegs of powder and nothing else. The debtor had other property. The loss arose from the officer's not taking and returning as attached the fifty kegs of powder. Held, such directions did not exonerate the officer.

In *Mason v. Ide*, 30 Vt. 697, the creditor gave directions which if pursued would have released the officer ; but the officer instead of following them did what he was not authorized to do. The court held that he must use reasonable judgment in regard to the meaning of the instructions and follow them in order to be released, and as the loss arose from not following the instructions strictly he was still liable as an officer. The rule of law is well expressed by Judge Morton in *Dunham v. Wild*, 19 Pick. 520 : "If the plaintiff does interfere, he cannot recover against

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the officer for any loss which might result from following his advice or directions."

2. The letter of Mr. Maeck and the deposition of Taylor, taken together, show that the instructions given by the attorney to the officer were equivalent to this, "for the personal property you attach you may take receiptors, and before you remove it you may go to the debtor and see if he will furnish receiptors."

Did this language justify the officer in understanding that he could safely omit any official duty, or be released thereby from his official liability for the ultimate responsibility of the receiptors in case he allowed the property to pass into their hands? We think not.

The taking of a receipt for property attached is a common mode of perfecting an attachment. It saves expense to all the parties, relieves the officer of the care and custody of the property and gives the creditor all he seeks for by his attachment, viz: security for his debt. It is at once so convenient and so safe a mode of securing all the purposes of an attachment that it has been adopted universally in practice; and though not authorized by statute is recognized in law as an official act having definite and well settled rights, duties, and obligations. Officers usually take good receipts whether instructed to do so or not. It is so much a matter of course that an officer will do so, that no one at all conversant with such business would either ask for or expect any directions on the subject. Hence the mere general remark that the officer may go to the debtor and see if he will furnish receiptors before moving the property, would not be ordinarily understood as discharging the officer from his strict official duties and liabilities. It would only be understood as expressing that wish in regard to the attachment which officers and creditors generally feel and express; that nothing should be done to make cost, or annoy or disturb the debtor, if the attachment can be perfected in the usual way by a receipt satisfactory to the officer and for which he is willing to be ultimately responsible.

If more than this was meant, the creditor or the attorney would advise as to the sufficiency of the receiptors; and the officer would require directions as to the receiptors he might accept.

We see nothing therefore in the letter of Mr. Maeck and the

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deposition of Mr. Taylor to show that the officer could have been misled in the least by the language or letter of the attorney to think that he was not to be held liable for the property to be attached to the same extent, and with the same strictness as to the ultimate responsibility of the receptors, as if he were acting without any other instructions than those contained in the writ.

III. The demand upon the officer was all that the nature of the case admitted. To require demand at Detroit would be unreasonable and impracticable.

IV. As to the defence that the receptors were solvent, and likely to remain so, when taken by the officer, the recent decision in *The Bank of Middlebury v. The Town of Rutland*, 33 Vt. 414, makes it unnecessary to dwell upon that point. The principle of that decision must control this.* Judgment affirmed.

*See *Gilbert et ux. v. Crandall*, ante p. 188.—REPORTER.

CLARK COURSER v. NOAH POWERS.

Oath of Office. Justice of the Peace.

A justice of the peace, in an action against himself for an arrest under a warrant issued by him, cannot justify, if he had not, before such arrest, taken the oath of office prescribed by the constitution of the state.

Nor will a subsequent administration of the official oath, on the same day of the arrest, enable him to do so, and the true time when such oath was taken may be shown.

Neither will the taking of the official oath under an election to the same office for the previous year enable him to justify. The official oath is only commensurate with the appointment, and covers only the existing term of office.

This was an action of trespass for false imprisonment, and was tried by the Orange County Court, at the June term, 1860. The defendant pleaded not guilty, and gave notice of a special justification.

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It appeared that on the 19th day of July, 1859, the grand juror of Thetford made complaint to the defendant, as a justice of the peace, against the plaintiff, and the defendant, as such justice, thereupon issued his warrant against the defendant, who was arrested thereon about eight o'clock in the morning, and was detained by the officer until near night, when he gave bail and was released.

It appeared that the defendant was duly appointed and commissioned as a justice of the peace for the year commencing December 1st, 1858, but had not taken the oath of office when said warrant was issued, but did take such oath about two o'clock in the afternoon of said 19th day of July, 1859.

It also appeared that the defendant had held the office of justice of the peace for the previous year, and that within that year he duly took the oath of office.

The defendant objected to the evidence offered by the plaintiff to prove at what time the official oath was administered to the defendant on said 19th day of July, 1859, and the court received the same, subject to such objection.

It was thereupon agreed by the parties, that the court should assess the plaintiff's damages, and that, if the supreme court should decide that such evidence was admissible, and that upon the whole case the plaintiff was entitled to recover, the plaintiff should recover final judgment for such damages in the supreme court.

The court assessed the plaintiff's damages at five dollars.

The county court gave judgment for the defendant, to which the plaintiff excepted.

Howard and Collins, for the plaintiff.

C. W. Clarke, for the defendant.

POLAND, Ch. J.—The question presented by this case is, whether a justice of the peace can justify an arrest upon a warrant, issued and signed by him, before he has taken the official oath required by the constitution of the state. The defendant insists that it was not necessary that he should take such official

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oath in order to justify under the warrant ; that this requirement of the constitution is merely directory.

If this cannot be maintained, then the defendant contends that the oath taken by him, as a justice of the peace for the previous year, when he held the office, extended over and covered the succeeding year, when the warrant was issued ; and also, that the administration of the oath subsequent to the arrest of the plaintiff on his warrant, had relation back and covered the whole of that day, upon the doctrine that in law there are no fractions of a day.

Upon the two grounds last named the court have experienced no difficulty. When a person is elected or appointed to an office for a fixed term, and takes the oath of office, the oath is commensurate with the appointment, and covers that official term, and no more. If the same person be re-appointed or re-elected, he holds his office under the new appointment or election, and must be inducted into office in the same manner as at the first. This was held to be the law in relation to official bonds, in the case of *Orange County Bank v. Mann et al.*, ante p. 371. The doubt in that case arose from the general language made use of, which, without any violence, might include the performance of the same duties under another election. Nor do we regard this as a case in which the rule, that in law there are no fractions of a day, properly applies. This rule has in general been held applicable to transactions of a public character, such as legislative acts, or public laws, or such judicial proceedings as are matters of record, where parol testimony would be inadmissible to prove any thing in relation to them, and, if it were received, and an issue of fact allowed to be made in every case where they came in question, would lead to uncertainty and confusion. Hence, as a rule of policy, as well as of law, the day on which such an act was done, as shown by the record, is either wholly included or excluded from its operation. But this doctrine is never applied in mere private transactions, involving rights between individuals, either of property, or for an injury to the person of one by the act of another ; there the true time, when an act was done, or a right or authority acquired by one, may always be shown. We do not regard the taking of the official

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oath by the defendant as being an act of that public character, coming within the rule, and if the arrest of the plaintiff, upon the defendant's warrant, was an illegal and unjustifiable act, as against the defendant, if he had not taken the oath when the arrest was made, we think it was admissible for the defendant to prove when such oath was taken.

The whole subject, as to when this rule of law applies, is thoroughly examined and discussed by that eminent jurist, the late Judge Prentiss, in a case before him in the District Court, reported in the 20th Vt. 653, and we refer to that opinion as embodying the true view of the law on the subject.

We are, therefore, brought to the direct question, whether the defendant can justify the arrest of the plaintiff, upon his warrant, he not having taken the official oath. The constitution of the state, second part, sec. 29, provides that every officer, whether judicial, executive, or military, in authority under this state, before he enters upon the execution of his office, shall take and subscribe the oath of allegiance to the state, and the oath of office, and gives the form in which each shall be administered. The defendant having been duly elected and commissioned as a justice of the peace, held the office under such an apparent title, that if he assumed to act as such, he was undoubtedly a justice *de facto*; so that as to third persons his acts must be regarded as legal, and could not be brought in question. But here the defendant, himself, is called upon in an action to justify an arrest made by his command, and all the cases agree that in such cases the officer must show every thing done necessary not only to his legal election or appointment, but also to his legal induction into office.

The reason for this distinction is obvious, and founded in good sense and substantial justice. Third persons, who are called upon to act under the authority of public officers, or who have occasion to avail themselves of the official aid of such officers, are not supposed to know, or to have the means of readily ascertaining, whether such officers have complied with all the necessary legal requirements to qualify them to perform their duties, but if such officer has been legally elected or appointed, and is in the performance of the duties of his office, they have a right to

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presume that he has taken all the necessary steps to his due qualification.

But the officer himself has no such immunity, because there is no occasion for it, as he must always know whether he has complied with the requirements of the law in his induction or qualification to the office.

This question has been before this court to some extent in former cases, though not expressly and directly adjudicated. In *Adams v. Jackson*, 2 Aik. 145, the plaintiff claimed title to the land in question, under a deed from a constable who had sold the land for taxes. The record was produced of the election of the constable, upon which was the word *sworn*. It was considered doubtful whether this was sufficient evidence that the constable was legally sworn, but the court held that the constable being in office under a valid election, he was *de facto* an officer, and the legality of his acts could not be called in question between third persons. The distinction between officers *de facto*, whose official acts bind third persons, and officers *de jure*, who may themselves justify their official acts, is very clearly defined by SKINNER, Ch. J., and the whole argument of the opinion proceeds upon the ground, that in order to make an officer *de jure* he must have taken the official oath.

Andrews v. Chase, 5 Vt. 409, was an action of trespass against a highway surveyor for property taken and sold for the payment of taxes against the plaintiff. The defendant was sworn before a justice of the peace on a day subsequent to the meeting at which he was elected. The plaintiff claimed that it should appear by the record that he was sworn, and that the oath should have been administered by the town clerk, or one of the selectmen. The court held that the plaintiff was properly sworn, and that it need not appear of record. In this case also, it is rather assumed than decided, that unless the defendant had been properly sworn, he could not justify his act of taking the plaintiff's property.

In *Putnam v. Dutton*, 8 Vt. 396, it was objected to an auditor's report that it did not appear therefrom that the auditor was sworn, but proof was made in court that he was in fact sworn. The court decided that it need not appear from the report that the

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auditor was sworn, and that unless the contrary was proved, it would be presumed he was, as the statute then required it. In the opinion of the court, REDFIELD, J., says: "It is true the statute requires the auditor to be sworn, and if he proceeds without being sworn, and this is made to appear in the proper mode, the report could not be accepted."

In *McGregor v. Balch et al.*, 14 Vt. 428, the question was whether the official acts of a justice of the peace, who also held the office of deputy postmaster, were valid between third persons. WILLIAMS, Ch. J., who delivered the judgment of the court, discussed at length the distinction between an officer *de facto*, whose acts are valid, as respects third persons, but invalid, as respects himself, and an officer *de jure*, who can himself justify, and cites with approbation the case in 5th Mass., where it was held that an officer not duly sworn could not justify his acts in an action against himself. The same question has been before the courts in other states, and by implication, at least, decided.

Colburn v. Ellis et al., 5 Mass. 427, was an action for an assault and false imprisonment; the defendants justified, as parish assessors, and the point directly decided by the court was, that the record of the official oath of the defendants, did not show that they were properly sworn into office, and judgment was rendered for the plaintiff. No question was made, as appears by the case, either by court or counsel, but that this was necessary to enable the defendants to justify the arrest of the plaintiff.

In *Wells et al. v. Battelle et al.*, 11 Mass. 477, the direct point decided was, as to the power of a parish clerk to amend his record, so as to show that the defendants were duly sworn as assessors.

In *Bucknam v. Ruggles*, 15 Mass. 180, it was held that a levy of an execution upon real estate, made by a deputy sheriff, who had not been duly sworn as such, was valid between the debtor and creditor, upon the ground that he was a good officer *de facto*. Both these cases, by implication, clearly recognize the doctrine, that to make a public officer such *de jure*, so that he can protect himself under his official shield, he must take the official oath, when one is required by law.

In *People v. Collins*, 7 Johns. 549, it was held that the acts of commissioners of highways, who had not been sworn into office,

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were valid as to third persons, on the ground that they were officers *de facto*.

In New Hampshire the question seems to have been more directly decided. The constitution of that state, is very similar to our own in this respect, except, that it does not apply to town officers. But by statute in that State, all town officers before they entered upon the performance of official duties, are required to take the official oath.

In *Johnston v. Willson et al.*, 2 N. H. 202, it was decided that in an action against a town collector for property seized for taxes, the defendant could not justify the taking unless he had been duly sworn into office. The arguments of the counsel are not given, so that it cannot be known what ground was claimed, but the point is discussed with the usual fullness of learning that characterized Judge Woodbury, and is directly decided.

In *Proprietors of Cardigan v. Page*, 6 N. H. 182, it was decided that a sale of lands by a town collector for taxes was void, unless it appeared by the record that such collector had taken the oath prescribed by law. It will be noticed that under a similar state of facts, this court held, in *Adams v. Jackson, ubi sup.*, that the acts of the collector were valid as an officer *de facto*.

In a subsequent case, *Blake v. Sturtevant et al.*, 12 N. H. 567, UPHAM, J., speaking of this case, says: "This case is now qualified in those instances where third persons are interested, where it is merely necessary to show an officer *de facto*, but the rule is correctly laid down in all cases where an individual must be shown to be an officer *de jure*." The last named case was an action against the selectmen of Keene for causing the plaintiff's oxen to be sold for taxes, and it was held that the defendants could not justify their official acts, without proving that they were duly qualified by taking the oath prescribed by law, that without this they were not officers *de jure*.

In *Cavis v. Robinson*, 9 N. H. 524, it was decided that a collector of taxes duly elected by the town, could not justify a taking of property for taxes, unless he had duly taken the oath of office. The same principle was again affirmed in *Ainsworth v. Dean*. 1 Post. 400, and in several other cases in New Hampshire.

In Maryland their state constitution has a provision in nearly

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the same language as our own, requiring all officers to take and subscribe the oath of office before they enter upon its duties. In *Thomas v. Owens*, 4 Maryland 189, the question arose in the following form: The plaintiff was elected controller of the treasury on the 5th of November, 1851, and duly commissioned, but did not take the official oath until the 24th of February, 1852. The plaintiff claimed that his salary commenced at the time of his election and date of his commission. The defendant, who was treasurer of the state, refused to pay, except from the time the plaintiff took the oath of office, and the question before the court was, which was right. The court decided in favor of the defendant. LE GRAND, Ch. J., said: "Now we hold that the late controller could not be considered as an officer until he was qualified by taking the oath prescribed by the fourth section of the first article. After his election and commission by the Governor, he had the right to invest himself with the powers and entitle himself to the salary, by qualifying in the manner pointed out by the constitution, but until he actually did qualify, he was no more controller than any other citizen, his qualification being an indispensable prerequisite to his investiture with the authority and responsibilities of the office." We have found no decision in conflict with the cases above referred to.

In considering the effect of this provision of the constitution, it is proper to refer to the common law on the subject, and the importance which had ever been attached to oaths in England, from whence our own law is mainly derived. By the common law all officers of justice were bound to take an oath for the due execution of justice; though it was held that if such *promissory* oath were broken, the violators could not be punished for perjury, but should be punished by a severe fine; *Jac. Law Dictionary, title Oath*; Wood's Inst. 412.

The acts of Parliament requiring oaths of every person appointed to perform any office, trust or duty, are very numerous, and not only for such purposes, but oaths applying to particular classes, and sometimes to the whole people, as the test oaths, oath of supremacy, &c., important events, not only in the legal, but also in the political history of that Government. It was ever regarded as an important guaranty for the due performance of

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any public office or duty, that the person to perform it should, in a public and solemn manner, call God to witness his promise to be just and faithful in the administration of it.

Such being the estimation of the importance and value of oaths, when our constitution was formed, we cannot suppose that our ancestors, in making this requirement and express provision of the fundamental law of the state, intended it to be merely directory, and to be obeyed or not, at the pleasure of her public servants. Their idea was similar, as we think, to that expressed by a very ancient English writer, who says: "Anciently, at the end of a legal oath was added, *so help me God at his holy dome*, i. e. judgment, and our ancestors would not believe that a man could be so wicked as to call God to witness anything which was not true, but that if any one should be perjured, he must continually expect that God would be the revenger." We are of opinion, therefore, that the official oath required by the constitution is a necessary requisite to the legal induction into office, and that any person that has been legally elected or appointed to such office, and assumes its duties without taking the oath, cannot be regarded as an officer *de jure*, and cannot, therefore, in action against himself, justify under his official character. This view, we believe, is not only in accordance with principle and authority, but also in harmony with the general understanding and practice of the people, of the legal profession, and judicial tribunals of the state ever since the constitution was formed. We have examined this subject with the more care, in consequence of an opinion advanced by a late distinguished judge of this court, in giving the judgment of the court in *Taylor v. Nichols et al.*, 29 Vt. 194, to the effect that this requirement of the official oath is mere form, and should be regarded as directory merely. The action was on a receipt given by the defendants to the plaintiff as sheriff, and the defence was that the sheriff never gave any legal recognizance as such, and therefore never became legally sheriff. The court inclined to consider the recognizance itself valid, but held, that whether so or not, as the plaintiff was a good officer *de facto*, and the attachment, therefore, legal between the parties, and as this suit was merely to enforce the attachment for the benefit of the creditor, the

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action could be maintained. It does not appear from the case that any question arose as to the plaintiff having taken the oath of office, and what was said on this point by the learned judge was merely by way of illustration, and probably without particular examination of the precise point involved in his observation.

The judgment of the county court is reversed, and judgment rendered for the plaintiff for the damages assessed by the county court.

GEORGE P. BALDWIN v. RICHARD R. ALDRICH.

Partition. License.

If a petition for partition of real estate prays not only for partition, but also, in case the premises are found not divisible, for assignment or sale thereof, in accordance with the statute, a plea that the premises are not partible is not sufficient.

When real estate held in common cannot be divided without great inconvenience to the parties interested, the fact that the plaintiff is not hindered in the enjoyment of his share of the rents and profits of the premises, furnishes no ground why the court, upon a proper petition to that effect, should refuse to order an assignment of the whole to one of the parties, or a sale for the benefit of all of them, in accordance with the statute.

The dictum of HUTCHINSON, J., in *Brown v. Turner et al.*, 1 Aiken 350, on this point considered and disapproved.

If on trial of a petition for partition it appears that the parties are tenants in common of only a part of the premises described in the petition, the court will proceed to make partition, assignment or sale, as the case may require, of that part.

So also, if one of the parties being a tenant in common in fee of the premises with the others, has in addition a license exclusively to use a portion of them for a particular purpose, and so long as certain structures thereon endure, this fact furnishes no reason why partition, assignment or sale, in accordance with the statute of partition should not be made of so much of the premises as are not covered by such license.

But partition will not be made of the reversionary interest in the premises covered by the license.

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The owner of premises consisting of a saw mill, grist mill, water privilege and lands adjacent, conveyed to A. in fee an undivided half thereof. The deed, after the description of the premises, contained the following words: "with the right to said A. to put in a mechanics' shop and planing mill between the saw mill and grist mill, and also to take water from the flume for the same, so as not to injure or interfere with the use of the water for the said mills or either of them, or such machinery as may be substituted for them." *Held*, that by this deed A. took, in addition to his undivided half interest in the whole premises, only a *license* to erect such buildings and occupy them, and use water for them, as above named, and that such license expired with the decay of the buildings.

PETITION FOR PARTITION. The petition set forth that the plaintiff and defendant were tenants in common of certain real estate in Bradford, which was described in the petition; that they owned each one equal undivided half thereof; and that the parties could not agree on the division of the same, and the petitioner prayed the court to appoint commissioners so examine and order partition of the same, or in case the premises should be deemed indivisible, to award accordingly as provided by the statute in such cases.

The defendant pleaded, first, that the premises were not partible; secondly, that the parties were not joint owners of any undivided interest in the premises, but that included in the premises was a lot of land upon which stood a mechanics' shop, with a water privilege thereto belonging, in which lot, shop and water privilege the parties had no interest either jointly or in common, but that the same belonged solely to the defendant; and thirdly, that of a portion of the premises the parties were equal tenants in common, which portion consisted of a saw mill and appurtenances, which for several years had been rented, and still so continued, to certain tenants selected by the plaintiff, who paid to each of the parties an equal share of the rents, in accordance with a subsisting agreement between the plaintiff and defendant; and that the premises had been and still continued to be occupied by said tenants in a husbandlike and skillful manner, and in no way to the injury of either of the parties.

The plaintiff demurred to the first and third pleas, and a trial was had on the demurrer, at the June term, 1860, in Orange County, BARRETT, J., presiding. The county court held the pleas insufficient, to which the defendant excepted.

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To the second plea the plaintiff replied, that the defendant did not own any part of the premises in severalty, but had merely a temporary right to erect a machine shop and planing mill on a certain portion thereof, and that subject to this temporary right of the plaintiff the parties were tenants in common of the premises. The defendant joined issue upon this replication, and the cause was tried by the court thereon at the January term, 1861, PECK, J., presiding.

It appeared that the plaintiff and Benjamin P. Baldwin being the owners of the premises described in the petition, and also of a grist mill adjoining, conveyed one undivided half thereof to the defendant. This deed, after the description of the land conveyed, contained the following words: "with the right to said Aldrich to put in a mechanics' shop and planing mill between the saw mill and grist mill, and also to take water from the flume for the same, so as not to injure or interfere with the use of the water for the said mills, or either of them, or such machinery as may be substituted for them." The saw mill, gristmill, and the land between them, as well as the whole water privilege for all the buildings on the premises, were included within the description of the land of which an undivided half was conveyed to the defendant by the above mentioned deed. Afterwards, and before the bringing of this petition, Benjamin P. Baldwin conveyed all his interest in the premises to the plaintiff, and the defendant, under the above recited privilege in the deed to him, erected upon the land between the saw and grist mills a machine shop, costing from two to four thousand dollars, and was at the time of trial in the exclusive occupation of the same. The machinery of this shop was carried by water supplied from the same flume which conveyed water to the saw and grist mills. The plaintiff and defendant had conveyed the grist mill to other parties previous to the commencement of this action.

Upon these facts the county court dismissed the petition, to which the plaintiff excepted.

Roswell Farnham and Abel Underwood, for the plaintiff.

R. McK. Ormsby and Peck & Colby, for the defendant.

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ALDIS, J. I. The first and third pleas are demurred to.

The first plea states the premises are not partible. The petition prays, first, for partition, and, second, if not partible, that the premises may be assigned or sold pursuant to the statute. Hence a plea merely that they are not partible is no sufficient defence to the petition. The third plea states that the petitioner has not been hindered in his enjoyment of his share of the premises. Is that a good defence? The plea is drawn upon the basis and after the form in 1 Aikens.

In *Brown v. Turner et al.*, 1 Aik. 350, the petitioner prayed for a partition of a saw mill, mill yard and pond. The court held the premises were not partible. HUTCHINSON, J., then proceeded to say, "This disposes of the whole case, for the only prayer is for partition. But if the prayer in the petition were for an assignment to one, or a sale of the whole, the court would not deem it proper to make any such order without different reasons from those which now appear. If the conduct of the petitioners were such that the petitioner could not enjoy his turn in the occupation of the premises, it would bear a different consideration."

All of the opinion that bears upon any controverted point in this case is clearly mere "*dictum*." If Judge Hutchinson's opinion extended to this—that when property held in common could not be divided without great inconvenience to the parties interested,* the court should refuse to make an order for assignment or sale pursuant to the statute, unless the petitioner could prove that he was hindered in the enjoyment of his share, we think the position untenable. There is nothing in the statute thus limiting or abridging the right of the petitioner or the power of the court. The first section of the statute provides that "any person holding real estate with others as joint tenants, tenants in common or co-parceners may have partition." The fourteenth section says, "when it shall appear to the court that such real estate, or any portion of it, cannot be divided without great inconvenience to the parties interested, they may order the same to be assigned to one of the parties," &c.; and section fifteen, "if no one of the parties will consent to take the assignment, the court shall order the commissioners to sell it at

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public or private sale," &c. Hence by statute on account of "the great inconvenience to the parties" of partition, assignment to one with his consent at an appraised price is first substituted; and if no one will consent, then sale and a division of the proceeds come next. There is nothing to indicate that assignment and sale do not stand upon the same ground of common law right as partition;—or that they are to be put upon the narrow ground of proof of injury to the possessory right of the tenant. Nor is there, as we can see, any reason why such distinction should be made between property partible and not partible. If the tenant in common of a farm is always allowed by his co-tenant to have his turn in the occupancy, why has he any greater right to partition than the owner of a saw mill enjoying his share in a like manner has to a division by assignment or sale. Both seem to us to stand in the common law right, and to seek the same end for the same reasons, through proceedings necessarily dissimilar in their progress but arriving at the same result.

II. The second plea alleges that the plaintiff and defendant are not joint owners of the premises; but that the defendant owns a mechanics' shop and water privilege standing on a portion of the premises described in the petition, and has the whole title and interest in the same, and claims that the deed from B. P. and G. P. Baldwin to him set forth in the petition shows such his title. The plaintiff replies, setting forth his title under the same deed, and insists they are tenants in common, and so issue is joined;—upon this a trial was had by the court.

The Baldwins being the sole owners of the premises, conveyed one-half of the premises to the defendant. If the deed stopped here, the plaintiff and defendant, it is admitted, would be tenants in common of the whole. But in the deed, after granting one-half to the defendant, there is this further clause: "With the right to said Aldrich to put in a mechanics' shop and planing mill between the saw mill and gristmill, and to take water from the flume for the same, so as not to interfere with the use of the water for the saw and grist mills, or such machinery as may be substituted for them." The defendant has built the mechanics' shop on the land, and has been and is in the exclu-

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sive occupation of it. Has he a fee, or an easement, or only a temporary right by license?

We think it must be regarded merely as a *license*. Had the parties intended to pass the fee they would have executed a deed in the usual form of the land intended to be conveyed. So the limiting the use to a mechanics' shop and planing mill indicates the intent to grant the use for a temporary purpose, but not to pass the fee. So the words, "with the right to said Aldrich," not, to him his heirs or assigns, show the like intent. We think it passes a right to erect and exclusively use the shop and planing mill while they last but that the right expires with the decay of the structure. *Hale v. Chaffee*, 13 Vt. 150; *LeFevre v. LeFevre*, 14 S. & R. 241; 17 S. & R. 383.

The plan of the premises and the exceptions show that the plaintiff and defendant are tenants in common of the saw mill and mill yard, and that the mechanics' shop covers but a very small portion of the premises. The defendant claims that his right to the shop and its exclusive possession defeats the plaintiff's right to a partition, not only of the shop and land covered by it, but also of *the remainder* of the premises—that the plaintiff must prove a joint interest in *the whole* of the premises described in his petition, in order to have judgment for partition.

We think the seventh section of the chapter on partition was intended to relieve the plaintiff from such strictness of proof and to enable him to have a severance of the joint interest according to his right, though his interest is not correctly described in his petition. The words are, "if the petitioner holds a less share than he claimed in his petition, judgment shall be rendered that partition be made according to the title of the respective owners." It would, we think, be narrowing the meaning of the act to construe the word *share* to apply only to undivided interests and not to superficial area. A party who declares for an interest in fifty acres, and proves an interest in only twenty-five, may as well have division of the twenty-five, as he, who declares for an undivided half of fifty acres, and proves that he owns but a third, or that his third extends only to twenty-five acres, may have a division of such "less share." Such

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too the cases show has been the practice under the act. See *Howe v. Blanden*, 21 Vt. 815. The petitioners therefore are entitled to partition, or to assignment or sale of all of the premises described in the petition, except so much as the defendant has the exclusive possession of, by his mechanics' shop and the use thereof.

As to the reversionary interest which the plaintiff and defendant jointly own in the land on which the shop stands, we think the plaintiff is not entitled to partition.

It was decided in *Nichols et al. v. Nichols et al.*, 28 Vt. 228, that the joint owners of the reversion of a farm in which a third party had a life estate, could not have partition. This was put upon the ground that the petitioners had no possession or right of immediate possession, and could have no possession till the termination of the life estate. The reason given is that a just division, made during the existence of a life estate, might become an unequal one when the parties came to the possession of their land. The opinion of JUDGE ISHAM is so full on this point, and his review of the authorities is so complete, that we need but refer to that decision. We think it applies to this case.

Judgment is therefore reversed, and the case remanded to the county court for the appointment of commissioners to make assignment or sale of all the premises described in the petition, except so much thereof as is exclusively occupied by the defendant by his mechanics' shop, and for the use of the same.

F. T. BRIDGMAN v. H. C. HOPKINS.

Slander.

In an action of slander, charging the defendant with having accused the plaintiff of the commission of the crime of adultery, it is competent for the defendant in mitigation of damages, to prove that the plaintiff, before the speaking of the words, was commonly reputed to be unchaste and licentious.

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This was an action of slander for charging the plaintiff, an unmarried man, with having had illicit intercourse with a married woman, and thereby committed the crime of adultery.

On the trial by jury at the December term, 1860, in Caledonia county, POLAND, Ch. J., presiding, exceptions were taken by the plaintiff to the admission of evidence offered in mitigation of damages, that before the speaking of the words the plaintiff's general character and reputation in the community for chastity was bad, and that he was generally reputed in the community to be an unchaste and licentious man.

J. A. Wing, for the plaintiff.

B. N. Davis, for the defendant.

BARRETT, J. It is claimed upon the above exceptions that the evidence was improperly admitted, for the reason, that while the alleged slander consisted in charging the plaintiff with having committed the crime of adultery, the evidence of character was not restricted to general character, in reference to the technical kind and legal quality of the act charged, which rendered the words slanderous and actionable. In other words, it is claimed that no evidence as to character was admissible, except such as tended to show that the plaintiff's general character was bad in reference to the *crime* of adultery. We think the exception is not well founded. It is uniformly held, that, in this kind of action, the plaintiff puts in issue his character, so far as the amount of damage is concerned, in reference to the subject whereof the alleged slander is predicated. The act of such intercourse, as the words charged in this case, is made a crime, and is visited with an ignominious punishment by provision of the statute, contrary both to the common and ecclesiastical law: 4 Bl. Com. 65.

Undoubtedly it is this provision of the statute that makes the words actionable *per se*. Without that provision, words charging illicit intercourse with a married woman would have no different effect, as constituting a cause of action, from words charging such intercourse with an unmarried woman. The act, in its

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moral and conventional character, would be the same in both cases, and would have the same bearing upon the character, moral and social, of the person committing it. The practice of such acts is *licentiousness*, and the character induced thereby is that of an unchaste and licentious man, as much so, certainly, when they are practiced with *married* as unmarried women. This result is as much involved in acts, which, under the statute, are visited with penalty as a crime, as in the same kind of acts to which such penalty is not attached. When, therefore, a plaintiff comes into court, for the reparation of injury brought to his character by the slander alleged in this case, we think that, as the act charged necessarily involves a specific moral and social debasement, irrespective of the final consequences imposed by the statute, he comes with his character as affected morally and socially by such debasement, when it has become matter of general reputation, whether produced by his habit of licentious conduct with married or unmarried women. It would seem to present to the general sense of the community a strange incongruity, to hold that the character of a confirmed and notorious debauchee is susceptible of injury to the same extent, by the charge of a specific act of illicit intercourse with a married woman, as that of a man unclouded by any suspicion of licentious conduct, unless such character as a debauchee should be shown to exist with reference exclusively to the practice of illicit intercourse with married women; and the incongruity would be rendered the more palpable, if it were to be held that it would require, on this ground, the same amount of pecuniary remuneration to repair the damage to the character of the debauchee reprobate, as to that of the unsuspected chaste man.

Change the state of the case, by supposing that the plaintiff, being unmarried, by a course of licentious conduct towards *unmarried* females had acquired a general character as a licentious debauchee. Having such a character, should he get married, and soon thereafter be charged with an act of illicit intercourse with an *unmarried* female—the same kind of act with the same quality of subject, by practising which, before marriage, he had acquired his character, and which, while he was unmarried, was not criminal under the statute—it would present a rare

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absurdity to hold, that the fact of his marriage had so obliterated his existing character up to that time, and had so renovated and purified him as to place him in the same category of immunity as the man whose life had ever been an ensample of purity and chastity; and the absurdity would be strongly illustrated, if he should have fallen into wedlock with a female as debauched as himself—an event likely enough to happen—and would equally involve the application of the rule claimed by the plaintiff in this case.

It seems clear, that the application of the established rule of law on this subject cannot be made to depend upon the accidental circumstance, that either party to the alleged act of illicit intercourse was married, and, by virtue of that circumstance, exclude evidence of the general character of the plaintiff for licentiousness, existing at the time the words were spoken, when such evidence is offered to affect the amount of damages which he should properly recover.

This view, in our apprehension, stands upon reasons that fully justify it, without the support of adjudged cases. Yet, as sustaining it, the case of *Stone v. Varney*, 7 Met. 86, and of *Bowen v. Hall*, 20 Vt. 232, may be referred to.

Judgment affirmed.

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Contract. Construction. New Counts. Payment of Money into Court. Costs.

New counts may be filed for the same cause of action.

Where the contract set forth in the new counts was the same as that described in the original declaration, with the exception that the new counts alleged an enlargement of the time for performance, it was held, that the new counts were for the same cause of action, in the sense of the rule applicable to pleading, and the allowance of amendments.

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All that is required is, that the new counts be founded in fact upon the same debt, demand or claim which the plaintiff seeks to recover by his original declaration.

An agreement to enlarge the time stipulated for the performance of a contract requires no new extraneous consideration to support it; the plaintiff's promise to accept performance within the enlarged time being a sufficient consideration to support the defendant's promise to perform within such enlarged time.

And where a recovery is had upon the new counts alone, the rule of damages will be, the market price of the commodity at the time of the refusal to deliver it, under the terms of the new stipulation enlarging the time for performance, and not the market price as the time it was to have been delivered by the terms of the contract as set forth in the original declaration.

In this case, the defendants, before the new counts, upon which alone the plaintiff recovered, were filed, paid into court a sum of money sufficient to satisfy all the damages the plaintiff could have recovered under the original declaration, and costs to the time of such payment, and the plaintiff took the same; it was held, that in the absence of proof that the plaintiff took the money in satisfaction of his claim, he was not thereby precluded from filing new counts, and recovering an additional sum thereon.

ASSUMPSIT. There had been a recovery in this case upon a former trial of the cause in the county court, and the judgment was reversed by the supreme court, on the defendants' exceptions. The case having been remanded to the county court, the plaintiff, by leave of court, filed new counts. The defendants moved the court to dismiss the new counts, as being for a different cause of action from that contained in the original declaration. The court overruled the motion, to which the defendants excepted. Plea, the general issue, with notice of special matter, and trial by jury, June term, 1861, POLAND, Ch. J., presiding.

On trial, the plaintiff offered and read in evidence a contract in writing, signed by the defendants, dated December 9th, 1856, by which the defendants contracted to deliver to the plaintiff two thousand bushels of oats, in the month of January following, at at the price of two shillings per bushel; on the back of which contract was a receipt in full by the defendants for the price of the oats, dated December 12th, 1856. At the time of making the contract the plaintiff was the owner of a line of stages, and had a large number of horses, and purchased the oats to supply

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his teams the ensuing season, and this was known to the defendants.

The plaintiff then introduced evidence tending to prove that early in January he commenced drawing oats from the store of the defendants, and so continued until all the oats the defendants then had on hand were delivered, which was about one-half the quantity purchased; that in the latter part of the month of January the plaintiff informed Mr. Smith, one of the defendants, that he was afraid the defendants would not deliver the oats as agreed; that Smith replied, they might not be able to deliver them all in January, but that the plaintiff should have the oats as fast as he would want them to feed to his teams; and that the plaintiff replied to Smith, that if he could have the oats as fast as he wanted them to feed to his teams, it would be all right; that the plaintiff's teams continued to draw oats from the store of the defendants, from time to time, until early in July following, when the plaintiff was informed by the defendants that they should not deliver any more. The whole quantity of oats delivered upon the contract was fifteen hundred and thirty-seven bushels and eight pounds. Soon after this refusal to deliver the remainder of the oats, the defendant, Carpenter, offered to pay back to the plaintiff the money he had paid to the defendants for the balance of the oats due on the contract, which the plaintiff declined to take, for the reason that oats were then worth seventy-five cents per bushel. The evidence tended to prove that the price of oats through the winter remained about the same as the contract price; that it advanced in the spring somewhat; and that in the summer oats became very scarce, and could not be purchased in any very considerable quantities, and were sold at from fifty to seventy-five cents per bushel. The plaintiff's evidence also tended to prove that he was unable to purchase oats, at any price, for his teams, as he wanted them, after the refusal of the defendants to perform their contract, and was obliged to buy corn, which was a more expensive and less suitable feed for his horses.

The defendants offered to prove that at the time when the contract was made, the plaintiff told the defendants that the two thousand bushels of oats was all he wanted, and if they would contract to furnish them he would buy no more himself, and they

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should have the whole ground ; and also that after the contract was made the plaintiff bought in the vicinity of the defendants five hundred bushels of oats, and that thereby the defendants were prevented from purchasing sufficient oats to fulfill their contract with the plaintiff.

To this evidence the plaintiff objected, but the court decided that if they proved the whole, it was admissible. The defendants did prove that when said contract was made, plaintiff told them that the two thousand bushels would be all he should want, and he should buy no more oats, and they would have the whole ground. The defendants also proved that a few days before the contract was made, the plaintiff had employed Lucius Robinson, of Derby, (about twelve miles from the defendants,) to buy for him five hundred bushels of oats, and gave him the money to enable him to do so ; that about the first of January Robinson bought for the plaintiff three hundred bushels of oats of one Wells, and two hundred bushels of one Gile, of Coventry, some seven miles from the defendants' store. The defendants' evidence tended to prove that previous to said Robinson buying said oats of Wells and Gile, the defendants had had some negotiation with them to buy their oats, and had offered them two shillings per bushel of thirty pounds for them, which they declined to take. The defendants testified that they should have bought Gile's and Wells' oats if Robinson had not bought them for the plaintiff, provided they could not have purchased better elsewhere. But the defendants did not introduce any evidence tending to prove that they could not have purchased in the month of January oats sufficient to have fulfilled their contract with the plaintiff, of persons living as near to them, and who would sell as cheap as Gile's and Wells. All the evidence on both sides tended to prove that there was no advance on oats for a considerable period after January, and that there were plenty of them then to be sold.

The court, therefore, excluded all the evidence on this subject, from the consideration of the jury, to which decision of the court the defendants excepted.

It appeared that after this suit had been entered in court, the defendants paid into court the sum of two hundred dollars to

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cover their admitted liability to refund the money received in payment for the oats not delivered, and the interest thereon, together with the costs of the plaintiff up to that time, and that the same was received by the plaintiff.

The court charged the jury that the plaintiff could not recover upon his original declaration, for the reason that it did not allege an extension of the time for the performance of the contract, and the breach thereof; that to entitle the plaintiff to recover under his new counts, he must establish that there was such an agreement between the parties to postpone the time of the delivery of the oats, as the plaintiff alleged, and that the defendants refused to deliver the balance of the oats due on the contract, according to such new or further agreement, and that the market value of oats was greater at the time of such refusal than the contract price, which had been paid into court by the defendants and accepted by the plaintiff; that if all these facts were found by them, the plaintiff would be entitled to recover the difference between the contract price and the fair market value of the oats at the time of the refusal by the defendants to deliver them. To the charge as given, the defendants excepted. The jury returned a verdict for the plaintiff upon his new counts for the sum of seventy-nine dollars and seventy-five cents.

The defendants claimed they were entitled to have deducted from such costs as the plaintiff was entitled to recover under the rule for filing his new counts, the amount of costs which the defendants paid into court as above stated; but the court held that the defendants were not entitled to such deduction, to which decision the defendants also excepted.

Willard and Peck & Colby, for the defendants.

Stoddard & Clark, for the plaintiff.

PECK, J. This is an action of assumpsit, counting specially on a contract for the delivery by defendants, at their store at Barton Landing, to the plaintiff, two thousand bushels of oats within a specified time, at thirty-six cents per bushel, to be paid for by a given time, in advance of the time of delivery; alleging

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the payment by the plaintiff according to the contract, and neglect and refusal by the defendants to deliver the oats.

The case was tried by jury, and the plaintiff recovered, but under the decision of the county court the recovery was only upon new counts filed by leave of court after the suit was entered.

The first question arises upon the defendants' exceptions to the decision of the county court in allowing the new counts to be filed under the general rule of court, and in overruling defendants' motion to dismiss them.

If the allowing the new counts to be filed came within the power of the court, this decision was matter of discretion, and cannot be reversed by this court on exceptions.

But it is claimed by the defendants' counsel that the new counts are not *for the same cause of action* as that set up in the original declaration. If this is so, in the sense in which that phrase is understood as applicable to allowing amendments, the decision was erroneous. As the exceptions to the decision overruling this motion and allowing the amendment, do not show what facts appeared on which that decision was based, the question is to be determined by a comparison of the new counts with the original declaration, and by a reference to the history of the proceedings in the cause and the facts developed at the jury trial, as set forth in the bill of exceptions, as has been done by the counsel on both sides in argument.

The counts in the original declaration state in substance that on the 9th day of December, 1856, the plaintiff bought of the defendants two thousand bushels of oats at thirty-six cents per bushel—good merchantable oats, to weigh thirty pounds to the bushel—and paid twenty-five dollars at the time of the contract, and the residue to be paid the next week, and in consideration thereof the defendants agreed to deliver the two thousand bushels of oats at the defendants' store at Barton Landing in the month of January then next; that the plaintiff paid the price according to the contract, and that during said month of January was ready and willing to remove the oats, and frequently in said month of January, and at the end of the said month, demanded them of the defendants, and that they, the defendants,

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refused to deliver them. The second count is substantially the same, only it admits the delivery of fifteen hundred bushels of the oats. The new counts count upon the same contract, and contain substantially the same allegations, with this addition in substance, that about the 20th of January, the month in which the oats were to be delivered, the plaintiff, at the request of the defendants, agreed to accept the residue of the oats not already delivered, along from time to time as fast as he should want them for the use of his teams during the then next season, that is, the spring and summer of 1857, and in consideration thereof, and that he had paid the price, the defendants agreed so to deliver them, and alleging that the defendants did continue to deliver and he to receive oats from time to time till July, 1857, when there was still a portion of the two thousand bushels undelivered, and alleging a demand to deliver the residue according to this stipulation. The proof in support of these new counts shows that the plaintiff made out his case, not by a new and independent contract for another two thousand bushels of oats, but by proof of the same original contract described in the original counts, and which was in writing, together with proof of the agreement to enlarge the time of delivery, which was verbal, and a refusal to deliver within the enlarged time.

In determining these questions of amendment the court are not confined to a mere inspection of the old and new counts to see whether the causes of action are the same in the sense of the rule applicable to pleading and evidence, that is, whether the evidence that would support the one would support the other, and to the full extent—but look, also, into evidence outside the pleadings, and enquire whether the new or amended count is founded in fact on the same debt, demand or claim which the party sought to recover by his original declaration. An action is brought on a promissory note, payable on time with interest, and the attorney who makes the writ, with the note before him, omits to state in the declaration that the note is on interest—the note is offered in evidence and rejected on the ground that it does not appear on comparison of the note and declaration to be the same note or cause of action described in the declaration—the court may very properly say the two causes of action are

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not the same, because in determining the question on trial the court cannot look beyond the note and declaration to determine the legal identity. But on application to amend so as to make the declaration conform to the note, the court are not tied down to an inspection of the note and declaration; they go into extraneous proof, and if they find it is in fact the same note on which the plaintiff brought his action, that is, the same cause of action *in fact*, they may treat it as a misdescription of the note and allow an amendment according to the truth, so that the note or cause of action offered in proof, and which is in *fact* the one sued upon, may appear so by the declaration, and thus make apparent on the record the same legal identity between the cause of action offered in evidence and that described in the pleading, that exists in point of fact. The contract upon which the plaintiff recovered upon the new counts is the same as that described in the original counts, except the original counts take no notice of the enlargement of the time; the price or consideration is the same, the oats to be delivered the same in quantity, quality and weight, and not only that, but it is not another or additional two thousand bushels, but the same. This contract is also proved by the same original instrument of evidence, except the oral proof as to the enlargement of the time of delivery.

We think the simple enlargement of the time of delivery, and the omission to aver this in the original declaration, does not show as matter of law that the causes of action in the two sets of counts are so different as to put it beyond the power of the county court to allow the amendment, but that they must be regarded as the same. Had the parties, when they made the agreement to enlarge the time, taken the written contract and inserted this stipulation in writing instead of letting it rest in parol, and the attorney who made the writ had accidentally omitted it in the declaration, could it be doubted that the amendment would be allowed? It is difficult to see how the case as presented is any more favorable for defendant than the case supposed.

But it is said that as the market price of oats rose between January and the time of the refusal to deliver under the enlarged time, it gives the plaintiff greater damages than he could have

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recovered without the amendment. It is no objection that an amendment may allow a plaintiff to recover more than he could without it. Every amendment in a matter of substance presupposes an existing defect, and one which, if not cured by amendment, will prevent the plaintiff from recovering some portion or all of his claim, else it would never be asked for, nor would it help the party if granted. Such is the case of the misdescription of the note as to interest already supposed. And again, if necessary in order to sustain the ruling below, this court must presume that when the action was brought the plaintiff supposed he had a right, and expected and intended under the original declaration, to recover the same damages he now seeks to recover under the new counts, and to the same extent. And this is the more probable as it appears he did claim so on trial before the new counts were filed, and so plausible was the reason in favor of such right, that the county court so decided, but which decision was reversed by the supreme court, as appears from this case as reported in 32 Vt. 433.

2. The defendants next claim that certain evidence introduced by the defendants under objection on the part of the plaintiff, and ultimately excluded from the jury, ought to have been submitted to them.

It is doubtful whether the evidence that when the contract was made plaintiff told defendants that the two thousand bushels would be all he should want, and he should buy no more oats, and that they would have the whole ground, is enough to warrant the jury in finding an agreement to that effect as a part of the consideration of the written contract made at the time; but however this may be, it is clear from the proof on this point that defendants suffered no damage from the plaintiff's agent, under instructions from plaintiff, given a few days before this contract was made, buying the five hundred bushels seven miles from the defendant's store a few days after the date of this contract;—this evidence was properly excluded.

3. The defendants claim that the plaintiff cannot recover on the new counts which allege an agreement to enlarge the time for the delivery. The first reason assigned is that at most the evidence only tends to show a waiver as to time.

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The exceptions state that some time in the latter part of January the plaintiff and defendant Smith had an interview, when plaintiff told Smith he was afraid defendants would not get the oats. Smith replied that they might not get them all in January, but that it was all right, and that plaintiff should have the oats as fast as he wanted them to feed to his teams. Plaintiff replied that if he could have them as fast as he wanted them to feed to his teams it would be all right; that plaintiff's teams continued to draw oats from defendants' store, from time to time, up to the fore part of July, when plaintiff sent his team for a load of oats and got but twelve bushels, and was informed by defendants that they should deliver no more. This evidence, in connection with the further evidence stated in the exceptions tending to prove plaintiff relied on getting these oats to feed his stage teams until defendants' refusal in July to deliver more, is evidence of an agreement for the enlargement of the time of delivery. The fact that both parties acted upon it tends to show they so understood it, and binds the parties.

It is objected that the agreement to extend the time of delivery is without consideration. The *status* of the parties in reference to the then existing contract was such that no new extraneous consideration was necessary if the new stipulation was acted upon. The original contract was then in force, no breach had been committed by either party, the plaintiff had paid the entire price of the oats, and had a right to insist on the delivery of the entire quantity of oats within the month of January, the agreement by plaintiff, to extend the time and accept a delivery at a subsequent period, and defendant on the faith of it omitting to deliver in January, is of itself a relinquishment of his, the plaintiff's, right to require a delivery in January, and the relinquishment of this right is a valuable and valid consideration for defendants' promise; or, to state it in another form, the plaintiff's promise to accept a delivery within the enlarged time, relied upon by the defendant until the original time expired, is a good consideration for defendants' promise to deliver within the enlarged time. It is a case of mutual promises, where the promise of each is the consideration of the promise of the other, and makes both legally binding. This objection must therefore

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fail—the defendants, on the faith of this agreement, having suffered the time to expire for the delivery under the original agreement, and delivering from time to time afterwards within the enlarged time, is a good consideration to bind the plaintiff.

No time need be spent in considering what would be the effect of a mere waiver on the part of the plaintiff, as the jury under the charge must have found an agreement to postpone the time of delivery, the court having told the jury that unless they found such agreement between the parties, the plaintiff could not recover.

The next reason urged why the plaintiff cannot recover on the new counts is, that where, after a contract is entered into and before breach, the plaintiff agrees on a different performance by the defendant, and the defendant fails to perform either the original or substituted agreement, the plaintiff may maintain an action on the original contract, and the defendants cite *Lawrence v. Dole*, 11 Vt. 549; and *Cummings v. Smith, Arnold & Co.*, 3 Met. 486. Neither of these cases involve that question—nor is the point raised or decided in either of the cases cited by the court in *Lawrence v. Dole*; there may be cases, however, where the plaintiff has that right. It is argued by counsel, that as the plaintiff may sue on the original contract, he therefore must sue on it, and cannot sustain an action on the substituted contract. But this does not follow. If the modification amounts only to a waiver on the part of the plaintiff, merely giving the defendant the privilege to comply either with the original or the substituted agreement, it may be so, as the plaintiff has no other binding agreement on which to predicate an action. But if the cases go so far as to allow the plaintiff to sue on the original contract when the defendant's promise has been altered by a new stipulation, it does not bar the plaintiff from suing, if he so elects, on the contract as modified if he deems it for his interest to do so. The reason on which the cases are founded which allow the plaintiff to sue on the original contract in such cases is, that the court will not allow a defendant who has not performed the original contract, and has contracted for a substituted performance and neglected to perform that, to set up the substituted agreement, unless he alleges he has performed it, as a

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defence against the party who has fully performed on his part. It is a privilege accorded to the party not in fault, and therefore should not be used to his prejudice. Where the reason of the rule ceases the rule ceases. Where there is a substituted performance on the part of the plaintiff agreed upon by such subsequent modification of the contract, and although he has complied with the original contract the plaintiff fails to perform the substituted agreement, he cannot recover: as is shown in the case of *Cummings v. Arnold*, 3 Met. 486, cited by the defendants' counsel. This shows that such new stipulation is binding and may be enforced against the party in fault in not performing it. If the plaintiff is bound to perform the substituted agreement on his part or lose all remedy on the contract, it would seem he ought to have the right to enforce such substituted agreement against the defendants when the modification of the contract is in the defendants' undertaking.

It is laid down as a well established principle by Lord Denman in *Goss v. Lord Nugent*, 5 Barn. & Ad. 65, that, "after the agreement has been reduced to writing, it is competent for the parties at any time before breach of it, by a new contract not in writing, either altogether to waive, dissolve, or annul the former agreement, or in any manner to add to, or subtract from, or vary or qualify the terms of it, and thus to make a new contract; which is to be formed, partly by the written agreement, and partly by the subsequent verbal terms engrafted upon what will be thus left of the written agreement." Thus clearly recognising the principle that in such case there is but one agreement left, and that is the agreement as modified by the subsequent verbal stipulations,—and this seems to be the most sensible doctrine—and if so, the plaintiff can clearly maintain an action for a breach of it. Suppose there had been by the new stipulation an increase of the quantity of oats, or variation in the price, as well as an enlargement of the time, it is difficult to see how the plaintiff could have had any remedy by action based entirely on the original contract, much less a remedy adequate to or commensurate with his real damages.

Cases are cited showing that where a party brings an action of covenant or debt on bond, or founded on a contract under

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seal, alleging an enlargement of the time, or other modification by parol and a performance by the plaintiff answering to the contract as thus modified, the action cannot be maintained. Such is the case of *Little v. Holland*, *Brown v. Goodman*, 3 Tenn. 590, and *Porter v. Stewart*, 2 Aik. 427 ; these cases turn on the form of action, as covenant or an action counting on a sealed instrument will not lie where the contract is partly in parol.

But it is said the court erred in the rule of damages, allowing the plaintiff to recover the market price in July, when the defendants refused to deliver the oats ; the defendants claim it should have been the market price in January, when the oats by the original contract were to be delivered. This is a material question, as it appears that the market price at the time the original contract was made was about the same as the contract price, and remained so till after January, and then gradually rose so that in July, at the time of the breach, the market price was fifty cents, and later in the season rose to seventy-five cents, and that the plaintiff was unable to buy oats and obliged to buy corn for his teams, a more expensive and less suitable feed. The rule the court adopted is the general rule, and we see no reason either technical or substantial why it is not applicable to this case—the rule laid down gives to the plaintiff only such damages as he suffered, whereas the other rule, having reference to the price in January, would deprive him of almost, if not quite, the whole damages he sustained. Had the defendants refused in January to deliver the oats and there had been no enlargement of the time, the plaintiff could have supplied himself at the then market price which was the same as he had paid the defendants ; but relying, as the case shows, on the defendants' delivering them along in the summer following, was, after the defendants' refusal, obliged to buy at a much higher rate. The defendants, by agreeing on a future substituted time of delivery, took upon themselves the chance of gain and risk of loss dependent on the rise or fall of price. Had oats fallen in price they would have gained by the enlargement of the time, and they should bear the burden of the loss by the rise. Had oats in January risen to fifty cents a bushel, and in July fallen to twenty-five cents, so that at the time of the breach of the contract the plaintiff could have supplied the deficiency by

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purchase elsewhere at twenty-five cents, could the plaintiff recover the high market price in January, damages which it was the very object of the defendants, to avoid in agreeing to the enlarged time, and damages which the plaintiff never suffered. We think therefore, the plaintiff had a right, if nothing had transpired save the defendants' breach of the contract to bar him, to recover on the modified contract set out in the new counts and under the rule of damages adopted by the county court.

But it is claimed that the payment of the money into court sufficient to satisfy all the damages the plaintiff could have recovered on the original counts and costs to that time, and the receipt of it by the plaintiff, before the new counts were filed, is a bar to the action, and the plaintiff cannot afterwards so amend his declaration as to enlarge his right of recovery under a new rule of damages and recover such excess.

Enough has been said on the subject of the right to file the new counts and to maintain an action on the contract as modified, to show that on this point we agree with the defendants' counsel, that in whatever form the plaintiff's rights may be sought to be enforced, whether on the original or modified agreement, it is but one entire indivisible cause of action;—hence if the plaintiff has accepted and received a sum of money in full satisfaction of this cause of action, whether on the basis of the original or substituted contract, it is a bar to any further claim in either form. But unless there is something to distinguish the case from ordinary cases of money paid into court, it is not a satisfaction unless it is equal in amount to what the plaintiff ultimately shows himself entitled to, or he has accepted and received it as full satisfaction. Had the plaintiff taken the money out of court and discontinued his action, it would be *prima facie* an acceptance in full satisfaction, but he has not done that, he receives it and still prosecutes his suit. But it is claimed that as the money was paid into court by the defendants and received by the plaintiff while the case stood only on the original counts, and was in amount equal to what the plaintiff could by law have recovered on those counts, that it is a satisfaction of the damages on the original contract on which the declaration then counted and hence must be deemed a full satisfaction of the entire claim. Such

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must be the effect if it is to be regarded as a satisfaction of the original contract, as there is but one entire cause of action. But we think it cannot be so regarded. When a defendant pays money into court it is paid in the cause and applicable to the real substantial cause of action for the recovery of which the suit is brought, and the defendant must pay enough not merely to meet the damages that the plaintiff may by law recover under the declaration as then framed; he must pay sufficient to meet any damages the plaintiff may recover under any amendment the plaintiff may legally make, and if the declaration is subsequently amended so as to entitle him to a larger sum than he could recover on his original declaration, the defendant may protect himself by paying in a further sum or risk the event on what he has already paid. He cannot, by paying money into court deprive the plaintiff of his right so to amend his declaration as to embrace his whole claim for the same substantial cause of action.

It is claimed there was error in the taxation of costs. The defendants when they paid the money into court, paid as costs sufficient to pay the costs that had accrued up to that time on the part of the plaintiff. The new counts were filed under a general order of court, that the plaintiff if he recovered only on the new counts should recover no costs up to the time of filing the new counts and the defendants' costs to that time to be deducted therefrom—plaintiff recovered only on the new counts. The defendants claimed that if they had not paid the costs accruing up to the time of paying the money into court, which was before the new counts were filed and the rule made on the plaintiffs as to costs, the plaintiff could not have recovered these costs in the ultimate taxation, and that therefore, those costs ought to be deducted from the plaintiff's costs as taxed under the rule, or in effect paid back. This would be so if the items which the defendants paid were included in the plaintiff's ultimate taxation, as the plaintiff should not be twice paid for the same items, but such does not appear to be the fact. The taxation is therefore legal. If there are any circumstances which make it so far equitable as to justify the county court in making such deduction it was to that extent a matter of discretion and cannot be revised by this court.

Judgment affirmed.

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GEORGE W. CHESLEY v. BENJAMIN F. BROCKWAY.

Trespass on the Freehold.

The plaintiff had taken a deed of the land, of which the defendant had notice, but had not entered into actual possession, and the grantor remained upon the land after the deed was given, by mere sufferance, and without any right or claim of right; *held*, that, under these circumstances, the plaintiff could maintain trespass *qu. cl. pf.*, for an entry by a third person upon the premises.

TRESPASS ON THE FREEHOLD for a quantity of manure. Plea the general issue, and trial by Jury, December Term, Caledonia County, 1861, POLAND, CH. J., presiding.

The plaintiff produced in evidence a deed from one Charles Varney of the premises, dated April 24, 1858, and recorded May 1, 1858. The manure in question was made on the premises while Varney was in possession of them, and was so situated as to pass by deed. The defendant's evidence tended to show that prior to the date of the deed from Varney to the plaintiff, he purchased the manure of Varney, and paid him for it, and that between the 24th of April and the 1st of May, 1858, he removed the manure from the premises, in which he was assisted to some extent by Varney. It also appeared that Varney remained in the house on the premises, with his family, for a few days after giving the deed to the plaintiff; but there was no evidence of any agreement or understanding that he might do so, or that he had or claimed any right to remain there, except by the mere sufferance of the plaintiff. The evidence for the plaintiff tended to prove that before the defendant removed the manure, he had notice of the sale and conveyance of the premises to the ~~defendant~~ plaintiff.

The court instructed the jury that if the plaintiff purchased and took a deed of the premises with no knowledge that the manure had been sold to the defendant, he would take a good title to it under his deed, though Varney had previously sold it to the defendant; and that, if, before the defendant moved the manure, he had knowledge that Varney had sold and conveyed the premises where the manure was situated, to the plaintiff, then he had no legal right to move it; but that if the defendant bought and paid for the manure before Varney conveyed the premises to the plaintiff, and moved it away before the plaintiff's

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deed was recorded, and without knowledge of the sale and conveyance to the plaintiff, then he might lawfully take it away; and the jury were further instructed that if Varney remained in possession after the sale and conveyance by the mere sufferance of the plaintiff, and without any legal right or claim of right to retain possession as against the plaintiff, the plaintiff could nevertheless maintain the action of trespass for taking away the manure. The defendant excepted to the charge as given. The jury returned a verdict for the plaintiff.

Peck & Colby, for defendant.

_____ for plaintiff,

ALDIS, J. When Varney sold the manure to the defendant, he was the owner of it, and of the land. The defendant's right to take it was at that time unquestionable, but his right would not ripen into a perfect title until he actually took it. Until such taking and severance by the defendant, the manure remained a part of the realty.

While thus remaining Varney sold the land to the plaintiff, without giving him notice of the sale to defendant. Thus the title to the manure passed by the deed to the plaintiff. At this point both plaintiff and defendant were *bona fide* purchasers—each having the same right of ownership. He who first perfected such right would get the complete legal title. The defendant could do it if he got the manure into his possession before the plaintiff's deed was recorded or he had actual notice of the deed. The plaintiff could do it if he recorded his deed, or if the defendant had actual and legal notice thereof, before taking possession of the manure. The jury must have found that the defendant had notice of plaintiff's deed before he removed the manure—and as such notice would perfect plaintiff's and defeat defendant's title—the act of removing by the defendant was wrongful. It has been claimed in argument that the notice to defendant of the deed was not sufficient. But upon this point the charge was not objected to by defendant—nor any request made for any special charge on the point. Nor does it appear from the case what the

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evidence of notice was—or that it was not sufficient to affect the defendant with full knowledge of the deed. The only question therefore that is fairly before us is whether trespass *qu. cl. fr.* will lie.

The objection is that the plaintiff had not a sufficient possession of the premises on which the manure was situate at the time it was moved, to maintain trespass on the freehold. He had taken a deed of the land, but had not entered into actual possession, and the grantor, Varney, remained in the house on the premises with his family for a few days after the deed, but by mere sufferance and without any right or claim of right.

The strict rule of the common law that the ownership of land does not give the owner constructive possession, but that he must have actual possession to sustain trespass, has been modified in the American courts; and now the possession of land follows the title. The legal owner of land is presumed to be in possession of it, unless there is an adverse possession, or some claim by one in possession of a right by contract or operation of law to the exclusion of the owner.

This was held in *Robinson v. Douglass*, 2 Aik. 374, and has been the law ever since in this State.

It is claimed that the doctrine of *Ripley v. Yale* in the 16 Vt. is to the contrary; but there Yale was in possession, claiming in his own right as purchaser under a contract. Here Varney remained in possession of the house without any claim of right, by mere sufferance—liable to be turned out at any moment. Trespass *qu. cl. fr.* will lie against a *strict* tenant at will, or at sufferance, for an injury to the reversionary interest of the owner of the freehold; and if against the tenant, then against one claiming to act under the tenant. This was the ancient doctrine of the common law, and has been repeatedly recognized in modern decisions—although in some cases like *Campbell v. Arnold*, 1 Johns, 511, cited by defendant's counsel, may be found to maintain that case is the proper form of action.

See 1 Hill'd on Real Prop., 552; *Starr v. Jackson*, 11 Mass. 519; 15 Wend. 169; 11 Johns, 885; 21 Pick. 367; 19 Vt. 517, *Cutting v. Cox*.

So trespass has been held to lie against an outgoing tenant at

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will who sells and moves the manure, and against the purchaser. 1 Hil'd on R. P. 277; 5 Greenleaf 222; 21 Pick. 367.

So where a tenant carries on a farm at the halves, the landlord has such a possession as enables him to bring trespass for an injury to his reversionary interest—as for cutting down trees. 19 Vt. 517.

Applying the reason of these decisions to the case at bar, it is clear that the plaintiff had such a possession as fully sustains the action for this injury. The injury was one affecting his interest in the land—in no wise affecting the rights of the temporary occupant. The occupant Varney remained in the house at the mere pleasure of the plaintiff, and only for a few days. He claimed no possession or right of possession in the land. His possession was of the most transient character—and for no purpose of cultivating or using the land. In such a case the title draws to it the possession for the purpose of redressing injuries to the estate of the real owner, as much as if the possession was really vacant.

Judgment affirmed.

GEORGE WHEELER v. L. C. WHELOCK.*False Warranty.*

- Where the defendant, in reply to an enquiry made by the plaintiff, in making the purchase of a horse, whether the animal was sound, said that he was so far as he knew, and the court, upon all the evidence, failed to find that the defendant *really believed* the horse was unsound, but did find that "he had reasonable and good ground to suppose that he was," and that he knew if he communicated what he had discovered, and what had been told him in relation to the horse, it would be likely to prevent the plaintiff or any purchaser from buying the horse, or materially lessen the price he could obtain for him, and lessen his value in the estimation of the plaintiff or any purchaser," it was held that this amounted to an affirmative misrepresentation, rather than a wrongful concealment of facts, which were material, and ought, in good faith, to have been disclosed.

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ACTION ON THE CASE for the false warranty of a horse. Plea, the general issue and trial by the court, March Term, 1861. PECK, J., presiding.

The plaintiff bought the horse of the defendant on the 23d day of July, 1859, at the price of one hundred and twenty-five dollars, for which the plaintiff gave his notes, and took the horse into his possession.

It appeared that the defendant, a few days before he sold the horse to the plaintiff, bought him of one Currier, at the price of seventy-five dollars, and a claim against an insolvent estate worth ten or fifteen dollars; that Currier had owned the horse for a long time, and had kept him at his residence, near to where the defendant resided, and that defendant had frequently seen the horse driven by Currier, but had not particularly examined him at the time he bought him; that for some time after Currier sold the horse to the defendant, the animal had appeared strangely, as if afflicted with fits, or crazy; and frequently, when standing in the stable, would appear dumpish, holding his head down, and standing in a manner indicating that he was sick; that at other times there was nothing in his appearance indicating, or which would be likely to lead one to suppose that he was otherwise than well and sound; that the horse was naturally fine looking, and would have been worth at least one hundred and twenty-five dollars, but for the sickness or infirmity above described, which the court found to be of a permanent character before and at the time of the sale to the plaintiff, and that it existed to such a degree as to greatly lessen the value of the horse.

The defendant bargained for the horse with Currier, verbally, at Barre village, but did not take him into his possession, nor pay any part of the price until two or three days after, when he and Currier went to the barn after the horse. The horse stood in the stable, with his head down, indicating that something ailed him—so much so that it attracted the attention of the defendant; and the defendant asked Currier what ailed the horse, saying he did not think there was any life in him; to which Currier replied that if he struck him with a whip, he guessed he would find as much life as he wanted. The defendant, thereupon,

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backed the horse out of the stable, when Currier told him that if he took him, he must do so at his own risk—that he must not expect him to take the horse back if he proved to be mad or crazy ; whereupon the defendant asked Currier if he knew any thing about the horse that was not all right, and Currier made some reply, giving the defendant to understand that he did not. The defendant led the horse home, but before he had put him into the barn, he and the plaintiff began negotiating the trade in question. Before the trade was concluded, and while the plaintiff was driving the horse a short distance, the defendant stepped into a blacksmith's shop, and while there, was informed by two workmen by the name of Benedict, that they had shod the horse a few days before, and that he then acted as if he had fits, and they did not think he was a sound horse ; and it also appeared that what the Benedicts thus told him was true. Within a few minutes after, the plaintiff returned, and the trade was closed, the plaintiff asking the defendant, just before the close of the trade, if the horse was sound, and the defendant replying that he was, so far as he knew, upon which statement the plaintiff relied. The defendant did not inform the plaintiff of what transpired between him and Currier when he purchased the horse of him, nor of the appearance of the horse on that occasion, nor of what was told him by the Benedicts.

In about a week after the trade, the horse began to have fits again, and exhibited the same appearance as above described. The plaintiff thereupon tendered the horse back to the defendant, and demanded his notes, but the defendant refused either to take the horse back or to give up the notes.

The court failed to find that the defendant, at the time of the sale to the plaintiff, had any other knowledge of unsoundness or of any other disease in the horse than as above stated ; nor did the court find that the defendant really believed, at the time of the sale, that the horse was unsound or diseased ; but they did find that he had reasonable and good ground to suppose that he was, and that he knew that if he communicated what he had discovered, and what had been told him in relation to the horse, it would be likely to prevent the plaintiff, or any purchaser, from buying the horse, or would materially lessen the price he could

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obtain for him, and lessen his value in the estimation of the plaintiff or any purchaser ; and the court decided, therefore, that it was the defendant's duty to have communicated his information to the plaintiff, and that he was not justified in telling the plaintiff the horse was sound so far as he knew, without also communicating the information as to his unsoundness, which he had received ; and upon that ground the court rendered judgment for the plaintiff, to which the defendant excepted.

G. C. Wheelock and Peck & Colby, for the defendant.

E. E. French and Wing, Lund & Taylor, for the plaintiff.

BARRETT, J. This is an action on the case for the false warranty of a horse, in the common form of declaring in such cases.

The evidence showed that the defendant, in reply to an inquiry made by the plaintiff in making the purchase, whether the horse was sound, said that he was so far as he knew. It was proved that the horse was in fact unsound at that time. The evidence showed that the defendant, before he sold the horse, and on the occasion of purchasing him of Currier, had discovered unsound appearances indicating some trouble, or at any rate, some unusual condition in the horse ; and that, when he made the purchase of Currier, he was told that he must take him at his own risk—that he must not expect him, Currier, to take him back if he was mad or crazy ;—and that, while the plaintiff was driving the horse on trial, pending the negotiation of the trade between the plaintiff and defendant, the defendant was told by the two Benedicts, how the horse acted a few days before on two occasions of being shod, and on account thereof that they did not think the horse was sound ; and specifically that he acted as if he had fits,—and that they told him truly. In a few minutes after this, on the return of the plaintiff in trying the horse, he made the said enquiry and received the said answer from the defendant, as to the soundness of the horse, and thereupon the trade was closed.

The court upon all the evidence, failed to find that the defend-

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ant *really believed* that the horse was unsound;—but they found, “that he had reasonable and good ground to suppose that he was, and that he knew that if he communicated what he had discovered, and what had been told him in relation to the horse, it would be likely to prevent the plaintiff or any purchaser from buying the horse, or materially lessen the price he could obtain for him, and lessen his value in the estimation of the plaintiff, or any purchaser.” What the defendant had observed, and what was told him constituted the reasonable and good ground for supposing the horse to be unsound. What he thus observed and was thus told him, would lessen the value of the horse in the estimation of any purchaser. These facts, then, were material, as bearing upon the subject matter of the trade. And though, in point of fact, they may not have operated to produce full belief in Wheelock’s mind that the horse was unsound, still being material facts looking in the direction of the unsoundness of the horse, and constituting *reasonable and good ground for supposing him unsound*, and the defendant knowing, as the court have found, that these facts would lessen his value in the estimation of the plaintiff or any buyer, the conclusion is irresistible that the defendant did know facts which tended to show the horse unsound, and which rendered untrue what he told the plaintiff, that the horse was sound *so far as he knew*.

If the defendant would have placed himself on safe ground, instead of making such a reply to the plaintiff’s enquiry, he should have stated those facts, thus constituting a good ground for supposing him unsound, to the plaintiff, and might, if he had seen fit, have accompanied it with any amount of positive asseveration of his disbelief of any unsoundness, or of his affirmative belief that the horse was sound.

The manner of stating the case leaves it somewhat equivocal, whether the court mean to leave it with no finding as to whether the defendant believed the horse to be sound, or to find that the defendant did not believe him to be unsound. But we do not regard it important how the exceptions should be construed in this respect. The question is not whether the defendant made a fraudulent expression of *his belief*; but whether he made a fraudulent expression in saying “the horse was sound *so far as he*

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knew." If he knew any thing contrary to the truth of that statement, then the statement was not true. The court upon warrantable evidence, have found that he did. The court have also found that he knew that those facts would lessen the value of the horse in the estimation of the plaintiff or any purchaser. Here, then, arose the duty to tell the truth in his reply to the plaintiff's enquiry, and his failure to do so operated the fraud complained of and found by the county court.

We think the county court put the case upon the ground of affirmative misrepresentations, rather than of wrongful concealment of facts which were material and ought in good faith to have been disclosed; and we think this the warrantable ground on which to place the decision of the case. This renders it needless to discuss the much mooted doctrine and the cases as to the duty of the vendor to make full disclosure of all material facts as to the quality and condition of the article of sale, under the head of *suppressio veri*, and leaves that subject for the present to stand in this state upon the adjudications hitherto made.

Placing the decision of the case, as we do, on the ground of affirmative fraudulent representation, it falls within principles and rules of application that are too well settled and familiar to require any discussion.

The judgment is affirmed.

JULIA HINSDILL v. JOHN WHITE.

Illegal contract. Fraud.

The rule will apply to a case of fraud, as to a case of duress, that where one has, by fraudulent means, induced another to pay him money, he cannot shield himself from paying it back on the ground that both parties had an illegal end in view in the transaction.

ASSUMPSIT upon the common money counts. Plea, the general issue, and trial by jury at the December term, 1859, for Bennington county, KELLOGG, J., presiding.

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On trial the plaintiff introduced evidence tending to show that on the 14th day of November 1857, the defendant went to the house of the plaintiff and stated to her that on the preceeding Wednesday or Thursday, (he and his family being absent from home on both of said days,) his house at North Bennington was broken into, and a sum of money and other things belonging to him had been stolen therefrom; that the plaintiff's son Norman, who was fifteen years of age, and who was at that time attending the Academy or school at North Bennington, was dismissed from school on the afternoon of said Wednesday, and that the teacher would take his oath that he was so dismissed and out of school on that afternoon; that a girl named Jane Thurber, who lived very near to the defendant's house, saw the boy go into the defendant's house on the same afternoon, and would so testify; that the boy had stolen the money and other things, and that he could prove it by the said Jane Thurber; that he had papers to arrest the boy, and that, if the plaintiff did not settle the matter, he would arrest the boy and send him to the state prison for stealing. The plaintiff's evidence also tended to show, that on this occasion the defendant took out certain papers from his pocket, and showed them to the plaintiff, and told her they were papers to arrest her boy.

The plaintiff's evidence further tended to show that, on the Monday next following, the boy was taken from school by his uncle, Alonzo Hinsdill, and Stebbins D. Walbridge, a grand juror of the town of Bennington, and, being charged with having committed the said crimes, he, while under duress and great fear and mental excitement, confessed to them, both on that day and the day following, that he entered the defendant's house and took the money; and also stated to them where he had concealed it; but no money was found on going to the place where the boy represented he had concealed it; and thereupon the boy represented to them that he had concealed the money in a different place, which was also visited, and examined, but no money was found at the last mentioned place, and there were no signs at either place of anything having been concealed there, as represented by the boy.

The plaintiff's evidence also tended to show that on Wednes-

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day the 18th day of November, 1857, she caused to be paid to the defendant the sum of eighty-five dollars in settlement of the claim which the defendant made against her son, and that on this occasion the defendant executed to her a receipt in writing, of which the following is a copy :

“Received, Bennington, November 18th, 1857, of Mrs. Julia Hinsdill, eighty-five dollars, which is in full of all claims I have against her and her son Norman, and I hereby agree not to sue or prosecute the said Norman in any manner or form, for anything heretofore done, or to be concerned in any such prosecution.”

(Signed)

“JOHN WHITE.”

The plaintiff's evidence further tended to show that, at the time this accusation was made against her son Norman, she was a widow, and had an elder son named Lyman, who was then sick at home, and in the last stage of disease, and that he died on the Saturday next following the payment by her to the defendant as aforesaid, that during the week previous to his decease, she was kept at home in constant attendance upon him, so that she had no opportunity to investigate or make enquiry respecting the truth of the representations so made to her by the defendant ; that she made the said payment solely upon the supposition and reliance that the representations so made to her by the defendant were true, although she knew at the time of making the payment that her son Norman had confessed the taking of the money and that immediately after the death and burial of her son Lyman, she made an investigation respecting the truth of the representations so made to her.

The plaintiff offered evidence to show the entire innocence of her son in the matter ; but as the plaintiff did not claim that the defendant's representations, that his house had been broken into, and money and papers stolen therefrom, were made in bad faith, nor that the defendant was insincere in the expression of his belief that the said Norman was guilty of the crime, the court ruled that evidence respecting the innocence or guilt of the son in that matter was inadmissible, except so far as it might be connected with, or might tend to establish the falsehood or truth of the other representations affecting the question of his alleged guilt; which,

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as was claimed by the plaintiff; were made to her by the defendant.

The plaintiff then introduced evidence tending to show that the representations respecting the said Norman being dismissed from school, and also respecting his being seen by Jane Thurber to enter the defendant's house, also respecting the defendant's having the papers to arrest the boy were entirely false, and known to the defendant to be false, when he made them to her.

The defendant introduced evidence tending to show that he acted in entire good faith in making the representations; that he did not make any representation to the plaintiff respecting her son being seen by Jane Thurber to enter his house, and that he made no representations to the plaintiff respecting his having papers to arrest her son.

The defendant's evidence also tended to show (and upon this point it was uncontradicted) that his house was broken into, and that a sum of money amounting to between seventy and ninety dollars was stolen therefrom, at the time he had represented.

Upon the evidence in the case the plaintiff claimed to be entitled to recover back in this suit the sum of money so paid to the defendant, with the interest thereon.

The defendant requested the court to charge the jury that if, at the time of the payment of the sum of eighty-five dollars so paid by her to the defendant, the parties believed the said Norman had committed the crime, and that it was paid for the purpose of suppressing evidence in a criminal prosecution against the plaintiff's son, or to suppress or to prevent a criminal prosecution against him, it could not be recovered back, and that, if it was recoverable under any circumstances, it could not be recovered until after demand. There was no evidence in the case tending to show that a special demand was ever made on the defendant.

The court declined so to charge, but did charge the jury that if they should find the defendant made the representations to the plaintiff respecting her son being dismissed from school, and respecting his being seen by Jane Thurber to enter his house, and also respecting his having the papers to arrest her son, as claimed to have been made by the defendant to the plaintiff or any of said representations, with the design that the plaintiff

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should believe and act upon the same, and, especially, for the purpose of inducing the payment of money to himself by her, as the consequence of such belief and while under its influence ; and should also find that these representations or any of them were false, and known to the defendant to be false at the time of making the same, and that the plaintiff by reason of the making of them, believed the same to be true, and paid to the defendant the sum of eighty-five dollars in consequence of the belief in the truth of the same, and would not have paid the same if she had not so believed in the truth of the same ; then the plaintiff would be entitled to recover back from the defendant the sum so paid by her to him with the interest thereon, even though the jury might also find that both parties at the time of making the payment believed Norman to be guilty of the crime alleged against him, and that the plaintiff intended in making the payment to the defendant thereby to suppress a criminal prosecution, or the evidence in a criminal prosecution, against her son ; and that it would not be necessary in such case for the plaintiff to make any demand upon the defendant for the repayment of the money.

The defendant excepted to the ruling of the court as to the inadmissibility of the evidence tending to show the guilt of Norman as above stated, and also to the refusal of the court to charge the jury agreeably to the above request, and also to the charge as given.

The jury returned a verdict in favor of the plaintiff for the sum of money so paid by her to the defendant with the interest thereon.

Lyman and Hall and Cushman & Meacham, for the defendant.

A. B. Gardner and T. Sibley, for the plaintiff.

POLAND, CH. J. The bill of exceptions in this case states that the defendant excepted to a decision of the court, excluding evidence offered by the defendant to prove that the plaintiff's son was in fact guilty of stealing the defendant's money.

But it does not appear from the exceptions, that the defendant offered any such evidence, or that any such decision was made.

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It does appear, that the plaintiff offered to prove that he was not guilty, and that the court excluded it, from which, as well as from the manner the case was presented to the jury, it appears the court below did not treat that fact as material in the decision of the case. The question is perhaps as fairly presented upon the charge as upon this exception. The case was put to the jury upon this ground, that even if plaintiff's son was guilty of stealing defendant's money, and both plaintiff and defendant believed him to be so, still, if the plaintiff was induced to pay the money to the defendant, and prevent the prosecution of her son, by the false and fraudulent statements of the defendant, in reference to the proof he could make against the son, and in reference to his having already procured papers for his arrest and prosecution, then the parties were not to be regarded as standing in *pari delicto*, and that the plaintiff would be entitled to recover back the money.

Was this instruction a correct view of the law ?

The general principles of law relative to contracts of this character, are not in doubt. A contract for the suppression of a prosecution for crime, is illegal and void ; the law will not enforce it, and if it has been fulfilled and payment made, the law will not furnish any remedy to recover back the money. In short, when parties contract upon such an illegal consideration, the law will leave them where it finds them, and furnish no aid to either. Both parties are regarded as equal sharers in the immorality and illegality of the transaction, and neither is entitled to any appeal to the law for relief.

But this case introduces a new element. The consideration and object of the contract and payment of the money, were in contravention of law, and to this extent the parties were in equal fault ; but the plaintiff was induced to enter into it, and to pay the money, by the false and fraudulent representations of the defendant. In such case are the parties to be regarded as in *pari delicto*, so that the law will regard them as equally reprehensible, and refuse to interfere ?

No case has been cited, nor have I been able to find any, where this precise question has been presented. The cases most analogous to this, are those where a party has been allowed to avoid

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his contract, and recover back money paid, because induced by duress. In that class of cases, it does not appear to have ever been regarded as any sufficient answer to an action to recover back money paid by a party under duress, that it was paid to stifle a prosecution, and that therefore the law would give no aid. In *Richardson v. Duncan*, 3 N. H. 508, RICHARDSON, Ch. J., says, "But it is now well settled, that where there is an arrest for improper purposes, without a just cause; or where there is an arrest for a just cause, without lawful authority; or where there is an arrest for a just cause, and under lawful authority, for unlawful purposes; it may be construed a duress." This terse statement of the law has been quoted in many subsequent cases, and by elementary writers, as a sound synopsis of the law on that subject.

Mr. Greenleaf in the 2d vol. of his treatise on Evidence, Sec. 111, in discussing the general subject of recovering back money paid, says: "But though the principal contract were illegal, yet if money has been advanced under it by one of the parties, and the contract still remains wholly executory and not carried into effect he may recover the money back upon the common money counts; for the policy of the law in both cases is to prevent the execution of illegal contracts; in the one case by refusing to enforce them, and in the other, by encouraging the parties to repent and recede from the iniquitous enterprise. And the same rule is applied to cases where, though the contract is executed, the parties are not in *pari delicto*; the money having been obtained from the plaintiff by some undue advantage taken of him, or other wrong practised by the defendant."

See also the case of *Worcester v. Eaton*, 11 Mass. 376. If then a party may recover back money paid to settle a prosecution for crime, if under duress at the time, why should not the same principle authorize the recovery back of money paid for the same purpose, when the payment was induced by the fraud of the party receiving it?

The payment of money by one under duress is not regarded as a voluntary payment, but as paid by coercion, but where one is induced to pay money by fraud, the law does not regard it as a voluntary payment, and upon that very ground allows it to be

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recovered back. We are therefore of the opinion that the same rule should apply to a case of fraud, as to a case of duress, and to hold, that when one has by fraudulent means induced another to pay him money, he cannot shield himself from paying it back, by saying that both parties had an illegal end in view in the transaction.

The false statements made by the defendant to the plaintiff, as to his ability to make proof of the offence against her son, and of his having already taken measures for his arrest, were eminently calculated, as they appear to have been designed, to force her into a compliance with his demand, and, under the circumstances detailed in the exceptions, would be likely to overcome any mother, anxious for the credit and safety of her son.

It is claimed also by the defendant, that if the plaintiff can maintain this action at all, there must first be a demand upon the defendant for the repayment of the money. Where one has money belonging to another rightfully and lawfully in his possession, or where one has received the money of another by mistake, without fault on his own part, the law requires that it should first be demanded of him, before an action can be maintained against him therefor; but where one has in any way wrongfully obtained the money of another, by duress, or fraud, no demand is necessary. When it is paid over by consent, but such consent is obtained by fraud, it is the same as if no consent had been given.

The judgment is affirmed.

MOSELY F. KING v. FREDERICK E. WOODBRIDGE.***Delivery of Written Contract. Evidence. Damages.***

The delivery of a written contract is indispensable to its binding effect, and is not conclusively proved by showing the delivery of the paper, constituting the alleged contract, by the alleged contracting party to the other. The lat-

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ter may show by parol that the paper was not delivered to, or accepted by, him as a contract, but as something else; in this particular case, merely as a receipt for certain articles to be transported by the defendant for the plaintiff by railroad.

Held, that the acceptance by the plaintiff from the defendant of this receipt, without reading it and supposing it to be merely a receipt, though it contained stipulations so indorsed upon it as to become a part of it, if treated as a contract, to the effect that the defendant did not guarantee any special dispatch in the transportation of any article, unless it were expressly so stipulated in writing, did not, under the circumstances of its reception, conclude the plaintiff from showing by parol that the defendant did guarantee the delivery of the articles at their point of destination with special dispatch and at a particular time.

It is competent for a witness to testify in regard to the general course of business in a particular trade, his knowledge of which is derived from experience therein, though partly obtained from information from others in the course of such business.

The defendant, a common carrier, contracted with the plaintiff to transport certain articles to a certain place by a certain time, being informed by the plaintiff at the time that he desired to have the articles there at the time named, because that was the market day for such property, and the most favorable time to sell it. The defendant having failed to fulfill his contract, it was held that the plaintiff was entitled to recover as damages the difference between what he was obliged to sell the property at when it did arrive in market, and what he would have received at the time at which it would have arrived, if the defendant had performed his contract.

ASSUMPSIT upon a contract that, in consideration of fifty dollars paid by the plaintiff to the defendant at the time of making the contract, the plaintiff delivered to the defendant, who was the managing trustee of the Rutland & Washington Railroad, and as such a common carrier, at Poultney, a certain number of sheep, on the 11th of May, 1857, which the defendant agreed to transport and deliver to the plaintiff at Troy, New York, the next day, by fifty minutes past four o'clock P. M., or in season for the plaintiff to get them on board a certain boat that left Troy the evening of the 12th of May, so as to arrive by due course of that boat in New York the next morning, (Wednesday) that being the sheep-market-day in New York. The breach alleged was, that the sheep were not delivered in Troy by the time specified, and not in season for said evening boat for New York, whereby the sheep were detained at Troy, at expense to the

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plaintiff, and did not reach New York in season for said sheep market on Wednesday, by reason whereof the plaintiff sustained damage by being obliged to sell them at a less price than he would, had they reached there in season for that market day, the sheep-market-day being the most favorable time to sell.

The defendant pleaded the general issue, and the case was tried by jury at the September Term, 1859, in Rutland County ALDIS, J., presiding.

The plaintiff's testimony tended to show that the plaintiff made a bargain with Jonas Wilder, the superintendent of the Rutland & Washington Railroad Company, for the transportation of 240 sheep from Poultney, Vt., to Troy, New York, for the price of \$50.00.

The defendants claimed that the contract for the transportation of the sheep was in writing, signed by Mr. Joslin, the station agent at Poultney, and delivered to the plaintiff at the time the contract was made and the sheep put on the cars,—and objected to parol evidence to vary or explain the terms of the contract. The plaintiff claimed and offered to prove by parol that the alleged contract was merely a receipt or voucher to show that the price of the transportation (\$50,) was prepaid,—that the paper was given at the time the \$50 was so prepaid, and was called a receipt, and intended only for such a voucher and not as the written evidence of the contract,—that the plaintiff only read the signature of Joslin at the time,—that he supposed it was a receipt merely, and did not read the rest of it till some weeks afterwards. The paper was produced, and was as follows :

“RUTLAND & WASHINGTON RAILROAD.

POULTNEY STATION, May 12, 1857.

Received of

<i>Articles.</i>	<i>Marks.</i>	<i>Weight or Measure.</i>
3 Cars Sheep.	M. F. King, Troy, N. Y.	40,000 lbs. at \$50.00 which is prepaid.

Numbered and marked as above, contents and value unknown, which the Trustees promise to forward by the Railroad and deliver to M. F. King or order, at the depot in Troy. But this engagement is in all respects subject to the terms and conditions of the regulations adopted and published by the Trustees and those indorsed hereon.

J. JOSLIN, for the Trustees.”

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Among the terms and conditions indorsed upon this paper, was the following: "The Trustees will not guarantee any special dispatch in the transportation of any articles, unless made the subject of express stipulation in writing." All of the conditions on the back of the paper, as well as the greater part of the face of the paper, were in print; the date, description, etc., of the articles, name of consignee, place of consignment, and signature alone being in writing.

This parol evidence was admitted subject to the charge of the court upon the facts as they might appear in the testimony.

The plaintiff then proceeded to testify as follows:—that on Monday, May 11th, 1857, he applied to Joslyn, the Station agent, and wished to know if the sheep could be carried to Troy so as to get there without fail, on Tuesday, in time for the sheep to be put on board the steamboat going down the river to New York that evening, and for what price they could be transported; that Joslyn told him the price would be \$50, but as to the time of arrival he could not tell him, and told him to go to Wilder, (the supt.,) to make the contract; that he went to Wilder, and told him that Wednesday was the sheep market day in New York—and that he had been put to \$30 extra expense the week before in getting his sheep to market in time for the market day, on account of the trains being too late for the boat, and that he wished to know whether he could depend upon it, and not be disappointed, that the sheep should get to Troy on Tuesday, and arrive there in time to be loaded on to the steamboat that went down that evening to New York; that in reply to this inquiry, the supt., Wilder, said to him, "I will warrant them to be there in time for the boat;"—that the plaintiff then said, that if he could depend upon it, he would have his sheep sent by the cars, but that he did not want to load the sheep on to the cars unless they would get to Troy in time for the boat of Tuesday evening; that Wilder said they had got everything arranged, and would have his sheep arrive there in time for the boat; that he (Wilder) said he would warrant the sheep to arrive at Troy by 4:50 P. M., or at any rate, in time for the boat; that the plaintiff thereupon said if he could depend on that, he would pay him the price of the transportation then, and he (Wilder) might give him a pass

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and he would go on in the morning train of Tuesday, and so have hands ready at Troy to drive the sheep directly from the cars to the boat; that he thereupon offered Wilder \$50 (the transportation price); that Wilder said to him, "You can pass the money to Joslin, and he will receipt it for you;" that he thereupon handed the money to Joslin; that Joslin handed him back the paper above recited; that he only looked at it to see that Joslin's name was signed to it, and then doubled it up and put it in his pocket and went off; that he was not requested to notice the paper; that he did not read it till some weeks after, and after this controversy had arisen; that he could not read such fine print as was on the back of the paper without his glasses, and that he did not take them out to read it; that he thought the paper was a receipt and nothing more. The witness further testified that the sheep did not arrive in time for the boat, and so were prevented from reaching New York before Thursday; that Wednesday was the best and principal market day for sheep; that the best buyers came on that day, and the loss on his sheep in the price for which they had to be sold on account of their arriving on Thursday instead of Wednesday, was fifty cents per head; that he had been to New York to sell sheep the week before this flock of sheep was sent, and that what he testified to as to Wednesday being the chief sheep market day, and as to his loss on account of their not arriving on Wednesday, was founded upon what he learned from being at New York on these two occasions, and from his inquiries then made in regard to such matters. To this testimony of the plaintiff, as to the market day and his loss, the defendants objected, but it was admitted by the court. The testimony on the part of the defendant directly contradicted the testimony of the plaintiff.

In regard to the paper above recited, the court told the jury that upon its face it was a contract to carry the three car loads of sheep without any warranty for special dispatch, and for their arrival in time for the boat; that it was only an agreement to forward them with reasonable diligence, and did not prove the contract as laid in the declaration; that the plaintiff claimed that he took the paper only as a receipt for money—a mere voucher that the freight was prepaid, and not as a writing embra-

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cing the terms of the contract. As to this claim of the plaintiff, the court charged the jury that if the plaintiff, in the exercise of reasonable and ordinary judgment and understanding in the transaction of business, had a right to understand from what was said and done at the time, and upon the occasion of writing and taking this paper; that it was merely a receipt or voucher to show that the freight was prepaid, and nothing more; and if, in fact, he did so understand it, and did not read it at the time, and did not know what the provisions of it were until after his sheep had been sent off in the cars to Troy, then the paper would not be conclusive evidence of the contract, and the parole evidence, to show a special contract warranting the arrival of the sheep at Troy in time for the boat, as alleged in the declaration, would be admissible, and might be weighed by them; but on the other hand, if, at the time of writing and taking the receipt, the plaintiff, using reasonable and ordinary judgment and understanding, ought to have understood from what was then said and done, that it was not merely a receipt or voucher to show that the freight was prepaid,—or if, in fact, he did not so understand it; or if he had read or knew what the provisions of the paper were before his sheep were sent off on the cars, then he would be bound by the terms of the contract as expressed in that paper, and the parole evidence would not be admissible to set up the special contract warranting the time of arrival, and such parole evidence must not be weighed or considered by the jury. The court also told the jury, that the fact that the plaintiff took and kept the paper, did not prove that he had actual knowledge of its provisions as printed upon its back; and if he had a right to understand, and did understand as aforesaid, that it was merely a receipt for the money when he took it, then it must appear that he afterwards, and before the sheep were sent off on the cars, had actual knowledge or notice of the terms printed on the back of the paper, in order to have it binding on him as a written contract so as to exclude the parole evidence.

To the charge of the court relating to the aforesaid paper, and to the plaintiff's claim in regard to it, and to the admission of the evidence objected to, the defendant excepted. In other

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respects the court gave such instructions as the case required, to which no exceptions were taken.

E. J. Phelps, for the defendant.

Briggs & Nicholson and *L. C. Kellogg*, for the plaintiff.

PECK, J. It is conceded that if the paper delivered by Joslin to the plaintiff was so delivered by the defendant and accepted by the plaintiff as to give it efficiency to the extent of its provisions or as a contract, it would exclude the parol evidence and defeat the plaintiff in his action, and the court in effect so told the jury.

The defendant claimed that it was the written contract of the parties, and that it excluded the parol evidence. The plaintiff denied its existence as a contract, and insisted on the right to prove the contract by parol evidence.

The defendant, having objected to the parol evidence on the ground that the contract was in writing, took the burden on himself to show that fact; that is, that there was such a written contract entered into between the parties. This involved proof not only that a written contract was executed, but that it was delivered.

The delivery of a written contract is no part of the contract, and is not proved by it. It is an act done in reference to it, but indispensable to give it efficacy to bind the parties to it. This act intervenes between the execution of the contract and the time when it becomes operative, and the proof of it essentially rests in parol.

This the defendant might have proved in various ways so as to exclude parol evidence of the terms of the contract: by the admission of the plaintiff, by a preliminary inquiry of him on the stand, or by Joslin, who handed it to the plaintiff, or, as was probably the fact in this case, by the production of it on trial by the plaintiff at the defendant's request, thereby showing it into the plaintiff's possession; for although this paper is not signed by the plaintiff, but by the other party only; yet, as a general rule, a delivery by the party signing a contract to the other party accepting it, binds the latter, as his assent to its terms is to be

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presumed. This paper being shown into the custody of the plaintiff, a due and proper delivery of it was to be presumed, and the burden is thrown on the plaintiff to obviate that presumption by proof. Was the evidence introduced by the plaintiff as to the circumstances under which the paper came into his possession, competent and sufficient to show that there was no such delivery of the paper as to make it operative as a binding contract?

There is no legal objection to the character of the evidence, that is, that it was parol evidence, since the question of delivery rests in parol. The defendant's evidence to prove the delivery was, in its nature, parol, and hence may be met by parol evidence on the other side. The real question is as to its sufficiency to do away with the *prima facie* influence of a delivery arising from the fact that the paper was shown in the plaintiff's possession at the trial.

This presents the question, what is a delivery? It is in its legal acceptance something more than merely changing the manual custody or possession. That may or may not be a delivery according to the intent of the parties. It is a question of intent and purpose; of mutual intent and purpose implying an acceptance as well as a delivery. It is the final act of the parties by which the party executing the instrument puts it into the possession of the other party to it, who receives it, both intending thereby to make it operative and binding. This intent and purpose is generally inferred from the act itself of thus changing the custody, or from the fact that the party to whom it purports to be executed has it in his possession, but it may be explained and rebutted. It may be shown that the party executing the contract handed it to the other party, not as a final delivery, but to be examined and returned to the party for further examination, or for the purpose of being retained till some precedent act is done by the party to whom it purports to be executed. It may be shown that the party obtained possession of it by accident, and against the will of the other party, or that by mistake of both parties a wrong paper was delivered. Nor is it necessary that it should be shown that it was by a mistake of both parties: a mistake of either is sufficient, especially when that mistake is caused by the conduct and declarations of the other party, as the jury found in this case.

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Suppose that the plaintiff after making the verbal contract as he did with Wilder, had offered to pay him \$50, on some prior dealings or indebtedness in no way connected with this contract, or with the transportation of the sheep in question, and, on Wilder's telling him to hand it to Joslin and that Joslin would give him a receipt for it, had paid it to Joslin and Joslin supposing it applied to the freight of the sheep had given him this paper, and he had taken it as he testified without reading it, supposing it was a receipt for the money on the prior indebtedness and nothing more, and did not know to the contrary till after this controversy arose, could it be claimed that he would be bound by it as the contract of the defendant to which he had no reason to suppose it had any relation? Clearly this would not be a delivery that would thus bind him. But it is claimed by defendant's counsel that as the plaintiff knew it had reference to this transaction, if he took it without reading it he did so at his peril and is bound by its contracts. It is true he knew the money he paid had reference to the contract he had just made, and supposed the receipt was a receipt for the freight he was to pay upon it, but the jury have found that from what transpired and from what was said and done, he did not suppose, and had no reason to suppose it was any thing more than a receipt for the money so to apply. The payment by the plaintiff was but a performance of his part of the contract, and a receipt for it would only be a written admission by the other party of the fact of payment; therefore the plaintiff, although he knew the receipt was to apply to this transaction, had no reason to suppose it would contain the terms of the defendant's undertaking, as that would not be within the scope or meaning of the term *receipt*, either in the legal or popular sense. A receipt and a contract are entirely different. One discharges, and the other creates, an obligation.

The plaintiff by being promised a receipt for the money, and so understanding it, had no notice that the paper delivered was a contract between the parties, so that the case in principle is the same as if the receipt he was to receive had reference to some other debt or transaction. The evidence, we think, tended to show that there never was any such delivery and acceptance of the paper, as a contract, as to make it binding as such between the

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parties, and the evidence was left to the jury under proper instructions, and they having so found were properly allowed to resort to the parol evidence of the contract.

The defendant having failed in the preliminary proof in establishing the fact that there was a written contract between the parties, his objection to the parol evidence was left with no foundation to rest upon.

It is conceded that if the plaintiff had been thus deceived through the fraud of the defendant such would be the result. But fraud under the circumstances of this case is unnecessary. The mistake and misapprehension produced by the declarations and conduct of the other party, is the same in its consequences to the plaintiff, and we think in legal effect, as fraud. It is entirely different from showing a mistake in the terms of a written contract duly delivered. It is therefore, unnecessary to enter into the question or into the causes, in reference to the admission of parol evidence of a contract when there is a contract in writing, for here was no written contract.

Another question is made as to the admission of certain evidence objected to by the defendant, and admitted by the court, as to Wednesday being the market day, and as to the loss of the plaintiff in the sale of his sheep in consequence of the sheep not being in New York that day. It appears that the plaintiff testified that Wednesday was the best and principal market day for sheep; that the best buyers came on that day, and that the loss in his sheep in the price for which they had to be sold on account of their arriving on Thursday, instead of Wednesday, was fifty cents per head; that he had been to New York to sell sheep the week before this flock of sheep was sent, and that what he testified as to Wednesday being the chief market day, and as to his loss on account of their not arriving on Wednesday, was founded on what he learned from being at New York on those two occasions, and from his inquiries there made in regard to such matters. This was objected to by the defendant, but admitted by the court.

On reference to the minutes of the judge who tried the case, it appears that the testimony of the witness as to his means of knowledge came out on the defendant's cross examination. It

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does not appear from the exceptions on what ground the defendant objected to this testimony, as the objection is general. It is now objected that the facts testified to by the witness on the direct examination, are not competent evidence, and also that his means of knowledge, as shown on cross examination, rendered his testimony inadmissible. Waiving the question made by the plaintiff whether these objections can now be raised as the case is presented, we think the defendant's objection must be overruled. The knowledge of a party of the general course of business in a particular trade, which he derives from being engaged in that trade, although partly derived from information from others in the course of such business, is of that general character that renders it competent evidence. Such is the character of this evidence. The limited extent of the knowledge of this witness was a question to be considered by the jury in weighing the evidence, and not one affecting its competency.

As to the other objection to the admission of this evidence, that the damages it tended to prove are too remote, we think that is equally untenable, as it appears, or at least the evidence so tends to show, that the defendant was informed of these facts at the time the contract was made as a reason why the plaintiff wanted the sheep in New York on that market day. If it was necessary, in order to entitle the plaintiff to recover such damages, to show that the defendant had such notice at the time the contract was made, (as to which we express no opinion,) the evidence tended to show it, and it is to be presumed the charge of the court was correct in this point, as no exception is taken to the charge, except in relation to the paper, and it is stated that in all other respects the charge was satisfactory to the defendant.

Exceptions overruled and judgment affirmed.

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TILTON, GREGORY & RICHARDSON v. J. & A. J. MILLER & CO.,
Principal Debtors, and X. C. STEVENS, *Trustee, and* ALEXAN-
DER MILLER, R. P. HAWLEY, JOHN GILFILLAN 2nd, AND
ALEX'R MCLEOD MILLER, *Claimants.*

Trustee Process.

The claimant, having demands against, and being liable as sureties for, the defendants, took from the latter an assignment of their stock of goods as security and indemnity for such demands and liabilities, and went with a deputy sheriff and put him in possession of the goods under the assignment. Afterwards, fearing that they might not be fully protected by such a proceeding, but not intending to abandon their rights under such assignment, they caused writs to be made in their favor against the principal debtor, and to be served by the same deputy, by attaching the property so assigned. These suits were regularly prosecuted to judgment, and executions issued thereon and placed in the deputy's hands. He sold the goods, but in their sale did not proceed as required by law in the case of sale on execution. Afterwards the deputy was summoned as trustee of the defendants. *Held*, that he was not chargeable as trustee to the extent of the actual demands of the claimants against, and their liability for, the defendants and the expenses of such sale.

TRUSTEE PROCESS.—The facts in the case sufficiently appear in the opinion of the court. The cause was tried by the court upon the commissioner's report, at the June Term, 1861, in Caledonia County, POLAND, CH. J., presiding, and the court adjudged that the trustee was not chargeable, and that the claimants were entitled to the funds in the trustee's hands to the extent of the executions in their favor held by the trustee.

To this decision the plaintiffs excepted.

Leslie & Rogers, for the plaintiffs.

_____, for the claimants.

PIERPOINT, J. The claimants in this case base their right to the funds in the hands of the trustee: 1st, upon the transfer of the property, out of which the fund was raised by the principal debtor, to them prior to its going into the hands of the trustee; 2d. upon their attachment.

From the report of the commissioner, it appears that on the

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14th of October, 1855, James Miller, one of the principal debtors, in consideration that Alexander Miller and John Gilfillan 2nd, (two of the claimants,) would then, and at future times, advance him money with which to purchase goods, agreed with them in writing, that they should have a lien upon all the goods he might afterwards have in his store, as security, and that the goods should be their property, with the right to take them at any time in payment, at cost, with reasonable deductions, &c. ; that in pursuance of said arrangement, Miller and Gilfillan did then, and at subsequent times, advance to him large sums of money, and also became liable for him, as sureties upon notes for other sums ; that, becoming alarmed as to their safety in the matter, they resolved to take measures to make their security available, and, after advising with their counsel, took from the principal debtor an absolute transfer of all the goods in the store, and other personal property, to secure and indemnify them for said debts and liabilities, and thereupon immediately dispatched their attorney, Mr. Potts, to West Barnet, the place of business of the principal debtor, to take the necessary steps to protect their interests. Potts took with him the trustee, Stevens, who was a deputy sheriff. On their arrival, Potts took possession of the store, delivered the key to the trustee, and directed him to take possession of the store and the charge of the goods, and permit no one to meddle with them, which directions he followed. Potts having doubts about the claimants' ability to protect themselves under their bill of sale, it was decided, on consultation between the claimants, Miller and Potts, to have writs made in favor of all the claimants in this case, (they all having claims against the principal debtor, or being liable for him as sureties,) and to attach the goods in the store thereon. Writs were accordingly made, and put into the hands of the trustee, Stevens, as deputy sheriff, and he attached the goods, made an inventory thereof, and made return on the writs in due form, and the suits were duly entered in court, at the term to which they were made returnable.

Immediately upon the making of these attachments, the claimants and the principal debtors agreed, in writing, that the trustee, Stevens, should proceed forthwith to sell the goods, which he

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did as soon as the inventory was made,—selling, sometimes at private sale, and sometimes at auction. He put up a notice of sale as a sheriff's sale, but did not give a formal notice of fourteen days. The whole was sold in about one month, and the proceeds amounted to \$1,936 32, which is the sum now in controversy.

It also appears from the report, that long before the service of the trustee process in this case, the trustee had paid of the aforesaid sum, to the claimants, or on demands against the principal debtor, whereon the claimants were liable as his sureties, and for expenses in doing the business, the sum of \$1,389 24. This was paid with the assent and under the direction of the claimants and the principal debtor.

It is difficult to see upon what ground it can be claimed that Stevens should be made chargeable with this sum as the trustee of the debtor. He did not have it in his hands when the process was served, but had paid it out under the direction of the only persons who had any interest in it, or any control over it. It is very clear that he cannot be made liable for that amount in this suit.

As to the balance in his hands, the question arises, who is entitled to that? It is said the claimants lost their lien upon the property under the transfer from the debtor, when they attached it upon their demands; that such act operated as an abandonment of their rights under it, and that now they must rely solely upon such rights as they acquired, and have preserved by virtue of their attachments. From a careful consideration of all the facts reported by the commissioner, we do not come to that conclusion. It is obvious that when Potts, as the attorney of Alexander Miller and Gilfillan, took possession of the property and put it into the possession of Stevens, the trustee, he did it under, and by virtue of, the authority conferred by the bill of sale, and that the attachments were resorted to in aid of that authority, they, probably, thinking that if the property was also attached, other creditors of the debtor would be less likely to interfere. They evidently had no intention of abandoning their rights under that agreement, nor did they suppose such would be the legal effect of the attachments.

The course subsequently pursued in the disposition of the

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property by Stevens under the written agreement, is consistent with this view, and is utterly at variance with the idea that he was acting solely under the authority of the attachments, and although the commissioner has, "from all the circumstances," expressed a "*belief*" that he did so act, still he has not found the fact to be so; and we think from all the circumstances he would hardly have been warranted in so doing. As deputy sheriff, he had no authority to pursue the course he did in disposing of the property. He could justify himself only on the ground that he was acting as the agent of the parties, deriving his authority directly from them, and even if he had supposed he was acting as a public officer, that would not, under the circumstances of this case, have affected the rights of the claimants to the funds in his hands.

The attachment did not discharge the parties' prior lien on the property by operation of law—they could pursue both remedies at the same time if they chose—the transfer of the property to the claimants did not discharge their claims against the debtor, as by the terms of the writing the transfer was made to them as "security and indemnity." It might, with the same propriety, be claimed that, to bring a suit upon a note secured by a mortgage on real estate, and to attach the mortgaged property thereon, would discharge the mortgage, as to claim that in this case the attachment operated as a discharge of the parties' lien.

We are satisfied from the whole case that the claim of Alexander Miller and John Giffillan 2d, under their assignment of the property, is a valid and subsisting claim, and entitles them to the proceeds of the property in the hands of the trustee to the amount of their debts against, and liability for, the principal debtor, and as the report shows that they are also holden on the same demands with the other claimants, for a sum sufficient to make their demand against the principal debtor much larger than the amount received by the trustee from the sale of the goods, they are entitled to the balance remaining in the hands of the trustee, after deducting from the whole sum received, the sum of \$1,389 24, being the amount paid out by him by direction of the parties as before stated.

As the judgment of the county court was in favor of the claim-

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ants only to the amount of their judgments, which are less than the sum received by the trustee, and less than their whole debts, and the trustee was discharged on grounds which, under the view that we have taken of the case, it becomes unnecessary now to consider ; and as the claimants have not taken exceptions to the decision of the county court, as the case stands, all we can now do is to affirm the judgment of the county court.

Judgment affirmed.

WILLIAM CLAPP, *Appellee*, v. JACOB FOSTER, *Appellant*.

Auditor. Relationship. Practice.

One is disqualified to sit as an Auditor in the trial of an action of book account, whose wife is first cousin to the wife of one of the parties.

Though the county court might in their discretion refuse to allow a party to make such an objection to an auditor after he had rendered his report, still it would not be error for such court to sustain that objection, even if made for the first time at so late a period of the case.

Evidence that the defendant offered to settle the plaintiff's claim if the latter would consent to a continuance of the cause for a certain period, is admissible as tending to establish his liability.

BOOK ACCOUNT. The cause was entered in the county court at the June term, 1857, in Franklin County. At that term the attorneys for the parties consented to the appointment of B. H. Smalley as auditor, knowing at the time that Mr. Smalley's wife was first cousin of the defendant's wife, but the fact of such relationship did not at that time occur to the plaintiff's attorney. Mr. Smalley was accordingly appointed auditor. The plaintiff shortly afterwards took out the rule in the cause and procured Mr. Smalley to appoint a time to audit the accounts of the parties, but the cause was not then heard, owing to the illness of the auditor. At the time the plaintiff procured Mr. Smalley to fix the time for the hearing, he had some conversation with him in

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regard to the relationship between the wives of the auditor and the defendant, and inquired of Mr. Smalley if that would disqualify him from acting as auditor. Mr. Smalley expressed no opinion upon this point, but referred the plaintiff to his counsel.

At the December term, 1857, the plaintiff's attorney moved the court to vacate the appoint of Mr. Smalley as auditor, and to appoint a Mr. Hall in his stead, assigning as a reason therefor only the fact that Mr. Smalley would be unable to attend to the trial of the cause on account of ill health. Mr. Smalley was accordingly removed by the court, and Mr. Hall appointed auditor. Subsequently during the same term, at the request of the defendant's counsel, who objected to Mr. Hall as auditor, and in the absence of the plaintiff's counsel, Mr. Hall was removed by the court, and Mr. Smalley re-appointed auditor. The plaintiff's attorney was not aware of this last change during the term.

Before the April term, 1858, the plaintiff again procured Mr. Smalley to fix a time for the hearing, and at the appointed time the parties appeared and the cause was tried by him. At the April term, 1858, Mr. Smalley's report as auditor was filed in court, by which it was found that there was nothing due from the defendant to the plaintiff.

At that term the plaintiff moved the court to set aside the report, and appoint another auditor, on account of the relationship above mentioned. The court, PIERPOINT, J., presiding, decided to set aside the report, and appointed another auditor, to which decision and appointment the defendant excepted.

On the hearing of the cause before the new auditor, he admitted as evidence to show that the plaintiff's account was originally just, testimony proving that since the commencement of the suit, and while it was pending before a justice of the peace, the defendant proposed to the plaintiff to have the suit continued for three weeks, and told the plaintiff that, if he would consent to such continuance, he, the defendant would settle the account in question, and have no more cost made about it. On account of the admission of such testimony the defendant excepted to the auditor's report, but the court at the September term, 1860, POLAND, J., presiding, overruled the exceptions, and rendered

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judgment on the report for the plaintiff, to which the defendant excepted.

S. S. Deavitt, W. C. Wilson, and James S. Burt, for the defendant.

J. Rand, H. R. Beardeley, and H. E. & L. H. Edson, for the plaintiff.

POLAND, CH. J. The principal question which has been made by the defendant in this case, is the alleged error of the county court in setting aside the report made by Mr. Smalley, the first auditor, and sending the case out to be tried by another. For my own part, I should be entirely satisfied to treat this action of the court below as an exercise of the mere discretion of that tribunal, which cannot be made a ground of legal error, and so not properly revisable by this court. It would not, I think, be claimed by any one, that the county court might not remove an auditor and appoint another, when no legal disqualification existed to the first, on any reasonable supposition that he might not stand wholly indifferent between the parties; and the sufficiency of the cause of removal could not be revised on exceptions. Nor does it seem to me that the power of the county court to remove an auditor is at all lessened, after he has made his report, from what it was before, or that their action in so doing is any the more ground of legal error, though this would generally materially affect the exercise of the discretion of the court on an application for such removal, especially if the cause was one known to the party when the auditor was appointed, or became known to him before the hearing before the auditor.

The setting aside an auditor's report, is, in principle and in effect, the same as setting aside a verdict; and ordinarily applications for the latter purpose are said to be addressed to the sound discretion of the court, and their action is conclusive; and so of all new trials granted on motion in the court where the cause is pending. I should not be prepared to say that the decision of any of this class of questions might not be made by the county court wholly upon a purely legal point, and wholly

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disconnected with the exercise of discretion, excepting to adjudge the legal point presented, and when so certified to us by that court, might not be revised here, and the decision reversed, if such legal question was wrongly decided. But the present case in my judgment does not show this state of things. The plaintiff moved the court to set aside Mr. Smalley's report, and appoint another auditor, on account of the relationship between Mr. Smalley and the defendant, and the court sustained the motion, but whether this was done upon the ground that such relationship legally disqualified Mr. Smalley, or whether it was upon the ground that such relationship had or might have biased his judgment and made it too favorable to the defendant, does not appear; and therefore no legal error appears; as the party alleging error in the proceedings of the court below, must always affirmatively show that error has been committed, to sustain his exceptions.

It is considered, however, by some members of the court, that the exceptions should be construed, that the county court set aside the first report, and removed the auditor, purely upon the illegal ground that the relationship between him and the defendant disqualified him to act as auditor in the case, and that the question is therefore properly before this court on the exceptions, and we have therefore considered the case in this view.

Our statute provides that no judge, or justice of the peace, shall sit in the trial of any cause where he is related to either of the parties, within the fourth degree, by consanguinity or affinity.

In *Churchill v. Churchill*, 12 Vt. 661, it was decided that the same rule of disqualification extended to jurors, though not named in the statute, and it is conceded by counsel on both sides that the same rule should apply to auditors.

The wives of the auditor and the defendant were first cousins, and were therefore related by consanguinity, in the fourth degree. It is conceded that the effect of the marriages was to create a relationship between the auditor and the defendant's wife, and between the defendant and the auditor's wife, in the same degree by affinity, and that neither would be legally competent to try a cause where the wife of the other was a party.

But the defendant claims that though by these marriages the

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auditor became by affinity a cousin to the defendant's wife, and the defendant a cousin to the auditor's wife, yet that no relationship whatever existed between the two men; that by marriage the husband becomes related to the blood connexions of his wife by affinity, in the same degree she is by blood; but that he does not thereby become related at all to those related to her by affinity merely.

The principle thus announced by the defendant's counsel, is found laid down in several early writers, and is quoted in some more modern ones, among which is Stephens' Commentaries, vol. 2, p. 285, cited by the defendant.

So far as I have been able to examine any of the old books where this is laid down, it has always been in treating of the laws of marriage, and within what degrees marriage may be lawfully contracted, and what marriages are unlawful and incestuous; a branch of the law originally established mainly by ecclesiastical rules and tribunals, and founded upon a policy quite different from one intended merely to secure an honest and impartial administration of the law in mere temporal tribunals. The object of the legislature in making this exclusion is entirely apparent; that persons so closely related to litigants, either by blood or marriage, as naturally to influence them in their favor, and cause them to desire their success, could not safely be trusted to judge between them and others, toward whom they were wholly indifferent. In a strict technical sense it may be correct to say, that by marriage a man becomes related by affinity only to the blood relations of his wife, but we are of opinion that the legislature in using this language, used it in the more popular sense, and intended to include not only such as would come within the strict rule, but such as by the common language and understanding of the people, fall within these degrees by marriage. The doctrine of the defendant fully carried out would lead to most mischievous results, and such as would bring disgrace and reproach upon our legal tribunals. Two men, whose wives are sisters, or one the daughter of the other, do not thereby become at all related by affinity, and either may legally act as a judge, juror, or auditor, in a cause where the other is a party. These, not only absurd, but scandalous results of adopting any

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such rule, are satisfactory to us, that the legislature never contemplated its limitation to the narrow line claimed for it.

The view we have taken of this subject is fully sustained by a satisfactory opinion of Chancellor WALWORTH, in *Paddock v. Wells*, 2 Barb. Ch. R. 331. In that case the exclusion was carried so far as to include a case like the present, where one of the marriages had been dissolved by death, but leaving issue of the marriage surviving.

The defendant also claims that if Mr. Smalley was disqualified by law to act as auditor in the case, the plaintiff had waived the objection by consenting to his appointment in the first place, and that it was too late to make it, or renew it, after the auditor had made his report. The fact that the plaintiff once applied and procured the court to remove Mr. Smalley as auditor, would seem to be a pretty satisfactory answer to the objection that he consented to his appointment originally, and after he was reinstated on defendant's application, it does not appear that the plaintiff had any opportunity to object in court until the report was filed.

But however this may have been, the decision of the county court as to the time when they would allow the question to be raised by the plaintiff, must rest in their discretion, and though they might have refused to allow it to be made at so late a day, still, if they did allow it then, and it was a legal objection, we cannot say there was error in law.

The evidence which the defendant objected to, of his offer to settle the debt if plaintiff would consent to a continuance of the cause for three weeks, was clearly admissible, as tending to establish his liability.

The judgment is affirmed.

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CYRUS HADLEY AND MARIA E. HADLEY, his Wife, v. TIMOTHY CROSS.

Liability of bailors of carriages to hire for defects in the same.

Bailment. Due Diligence.

Livery-stable keepers, and others, who let horses and carriages for hire, are answerable to the hirer for injuries which happen by reason of defects in carriages, which might have been discovered by the most careful and thorough examination, but not for an injury which happens in consequence of a hidden defect, which could not, upon such examination, have been discovered.

In a business involving the personal safety and lives of others, due care and diligence are nothing less than the most watchful care and the most active diligence. POLAND, CH. J.

CASE to recover for an injury to the plaintiff, Maria E. Hadley, alleged to have happened in consequence of the letting by the defendant to the plaintiff, Cyrus Hadley, of a horse, wagon, and harness, to go on a journey, which wagon was unsafe and insufficient for that purpose. Plea, the general issue, and trial by jury at the March term, 1861, in Washington County, PECK, J., presiding.

It appeared that the plaintiff, Cyrus Hadley, hired of the defendant, who was a livery-stable keeper, a horse, wagon, and harness, to go on a journey with his wife, and that while on such journey, in consequence of the breaking of the spring to the snap on the thill of the wagon to which the hold-back part of the harness was attached, the horse was frightened and capsized the wagon, throwing out the plaintiff, Maria E. Hadley, and seriously injuring her. The testimony on the part of the plaintiffs tended to prove that the broken spring had the appearance, from rust and other indications, of having been nearly broken off for a long time, and before the hiring of the wagon from the defendant by the plaintiffs.

The plaintiffs requested the court to charge the jury that it was the duty of the defendant by law to furnish the plaintiffs a carriage and harness adequately strong and sufficient for the journey, and which, with ordinary use, would not fail on the journey for which it was hired.

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The court refused to charge as requested, but instructed the jury that it was the duty of the defendant, by law, to furnish the plaintiff with a carriage and harness reasonably strong, safe, and secure for the journey for which they were hired, (with one qualification named below); that it was not a sufficient compliance on the part of the defendant with his duty in this respect, merely to provide himself with safe and secure carriages and harnesses, and continue to let them from time to time without examination, till they should break or give way, and then repair and supply them; that it was his duty, by prudent examination and careful and particular inspection from time to time, to keep them reasonably safe and secure, so that they should be so when let; that it was not sufficient that they were apparently so to a casual observer on a general view without a particular examination; if they were suffered to go out to a customer with a defect that could be discovered by a prudent, careful, particular, and critical examination by a man reasonably skilled in such matters, which would render them unsafe, the defendant would be responsible for the consequences; that if he should suffer them to go out without such inspection, it would be at his peril as to such defects, if there should happen to be such at the time he delivered them; that if there was any secret defect which he neither knew of nor supposed to exist, and which could not be observed or discovered by such prudent, careful, particular, and critical examination, for such defects he would not be responsible; that it was not sufficient that the defendant, when he let the horse and carriage, believed it was safe; but the question was, how it was in fact; that it was no excuse for the defendant that he did not know of any defect if he could have known it by such examination and inspection as above described; and if so, it was the same as if he did know it, so far as related to the plaintiff's right to recover.

To the refusal of the court to charge as requested, and to the charge as above detailed, the plaintiffs excepted.

Heaton & Reed, for the plaintiffs.

O. H. Smith and Redfield & Gleason, for the defendant.

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POLAND, CH. J. It is conceded on both sides that the same rule of duty and diligence should be applied to the letter of horses and carriages for hire, for others to drive, as to coach owners or other passenger carriers, who furnish drivers as well as teams. The plaintiffs claim that the law holds both responsible for the absolute sufficiency of carriages, harnesses, etc., and that if the driver or passenger receives an injury by reason of a defective carriage or harness, he is entitled to redress, though the defect was not visible, and could not be discovered by the most careful examination.

The defendant claims they are only liable for the want of due care and reasonable diligence.

It seems now universally settled in this country that the strict rule of liability applied to common carriers of goods, does not apply to carriers of passengers. While the carrier of goods is liable for any loss or injury that may happen to them, even with no fault on his part, unless occasioned by the act of God or the public enemy, the carrier of passengers is only liable for negligence. It is not needful now to discuss the policy on which this difference is founded.

Some of the books and cases say the carrier of passengers is only liable for the want of due care, or reasonable care; others say they are bound to extraordinary care, and the highest diligence, to ensure the safety and security of their passengers.

But we apprehend there is no real difference in the meaning of these terms as applied to the subject. In any business involving the personal safety and lives of others, what is due care, reasonable diligence? Clearly nothing less than the most watchful care and the most active diligence; anything short of this is negligence and carelessness, and would furnish clear ground of liability if an injury was thereby sustained.

The case of *Ingalls v. Bills et al.*, 9 Met. 1, settles what we deem to be the true view of the law on this subject. In that case all the authorities are carefully reviewed, and the English cases now relied on by the plaintiff as establishing the principle of absolute liability, are shown not to support it, though the language of some of the judges might seem to countenance such a doctrine. The principle established by that case is stated by the

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reporter as follows: "Proprietors of coaches, who carry passengers for hire, are answerable to a passenger for an injury which happens by reason of a defect in a coach, which might have been discovered by the most careful and thorough examination, but not for an injury which happens by reason of a hidden defect, which could not, upon such examination, have been discovered." The principle settled by that case seems to have been carefully followed by the judge who tried this case, in his instructions to the jury.

The doctrine of the plaintiffs by which the defendant would be held liable for defects in his carriages and harnesses, which he did not know, and which he could not have discovered by the most careful scrutiny, we think would be grossly unjust, and it is one not ordinarily applied to any other of the dealings and relations of society.

The judgment is affirmed.

ENOCH BLANCHARD v. WILLIAM A. WEEKS.

Statute of Frauds. Contract not to be performed within a year.

A memorandum in writing, as required by the statute of frauds, is necessary only when it appears by the whole tenor of the agreement that it is *not* to be performed within a year.

A contract by W. "to refrain from the practice of medicine and surgery at McIndoe's Falls while B. should reside and practice medicine and surgery at said McIndoe's Falls, and forever," *may* be performed within a year, and therefore need not be in writing.

CASE. The declaration alleged that prior to December, 1856, the defendant had been for a long time, to wit, seven years, a resident practicing physician at McIndoe's Falls; that the plaintiff was then a physician and surgeon residing at Peacham; that

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in consideration of seven hundred dollars paid by the plaintiff to the defendant, the defendant sold and delivered to the plaintiff one buggy wagon, one gig, one harness, two sleighs, and all the medicines, surgical instruments, medical books and office furniture, then belonging to the defendant, and also promised to "sell to the plaintiff his, the said defendant's, good will in the practice of medicine and surgery at said McIndoe's Falls, and to refrain from practice of medicine and surgery at said McIndoe's Falls. while the plaintiff should reside and practice medicine and surgery at said McIndoe's Falls, and forever ; and the declaration alleged a breach of the contract in this, that the defendant did not refrain from the practice of medicine and surgery at McIndoe's Falls, but erected a sign at McIndoe's Falls, and held himself out as a physician and surgeon, and entered upon practice, &c. Plea, the general issue, and trial by jury, December term, Caledonia County, 1860, POLAND, Ch. J., presiding.

On trial the plaintiff offered parol proof to establish the contract set up in the declaration, to which the defendant objected, claiming that the contract was one required by the statute of frauds to be in writing. The court overruled the objection and admitted the evidence, to which decision the defendant excepted. The contract was then proved wholly by parol evidence. The jury returned a verdict for the plaintiff.

Jonathan Ross, for the defendant.

B. N. Davis, for the plaintiff.

PIERPOINT, J. It is insisted by the defendant that the contract declared on, not being in writing, is within the statute of frauds, as being one not to be performed within a year. The particular branch of the contract on which this action is based, and for the breach of which the suit is brought, is that wherein the defendant stipulates that he will "refrain from the practice of medicine and surgery at McIndoe's Falls, while the plaintiff should reside and practice medicine and surgery at said McIndoe's Falls, and forever."

This stipulation in its character is strictly personal, to be per-

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formed by the defendant himself, and one which can never become binding upon his representatives, or any other person. It is not to be performed by any active agency of the defendant, but only requires a passive acquiescence in its provisions. It is binding upon the defendant while he lives, but at his death all obligation terminates; the end sought to be attained by it is fully accomplished, and the contract is then performed. Although the expressions are that the defendant will refrain from the act *forever*, it is but saying that he will not do the act, the obligation of which ceases at his death. It is a contract therefore to be performed during the life of the defendant, and if not violated during his life-time, is fully performed at his death.

Is a contract that is to be performed during the life-time of the contracting party, within the statute? A construction was given to the English statute which in its terms is precisely like ours, at an early day. The case of *Fenton v. Embler*, 8 Burr. 1278, was where May, the testator, agreed by parol with the plaintiff, Sarah Fenton, to pay her wages at and after the rate of six pounds for one year, and also by his last will and testament to give and bequeath to the said Sarah a legacy or annuity of sixteen pounds by the year. The said Sarah entered the service of the testator, and continued therein to the time of his death, a period of over three years. As the testator did not leave her the legacy, the action was brought to enforce the agreement. And it was held that the contract was not within the statute. DENNISON, J., says: "the statute of frauds plainly means an agreement *not* to be performed within the space of a year, and expressly and specifically so agreed. A contingency is not within it, nor a case that depends upon contingency. It does not extend to cases where the thing *only may* be performed within the year." And in the course of his opinion the learned judge quotes with approbation from the opinion in *Peter v. Compton*, Skinner 353, the following: "Where the agreement is to be performed upon a contingent, and it does not appear within the agreement that it is to be performed after the year, then a note in writing is not necessary, for the contingent might happen within the year, but

when it appears by the whole tenor of the agreement that it is to be performed after the year, then a note is necessary, otherwise not."

The case of *Fenton v. Embler*, was one in which the contract could only be performed by the death of the party, thereby giving effect to a will containing the stipulated legacy. His death was the only contingency upon the happening of which within the year the agreement would be performed.

The case of *Boydell v. Drummond*, 11 East 142, recognizes the same doctrine; and although the court held the contract within the statute, it was expressly on the ground that by the terms of the agreement it was not to be, and could not legally be, performed within the year.

In *Wells v. Horton, Exr.*, 4 Bing. 40, the agreement was, that the executor of the party should, after his decease, as such executor, pay to the other 10,000 pounds; this was held not to come within the statute. BEST, CH. J., says: "If I were to keep out of view all the decisions, I should say this was not a case within the statute. The plain meaning of the words of the statute is confined to contracts which, by agreement, are not to be carried into execution within a year." PARK, J., says, in the same case, "the thing rests on contingency, and clearly may be performed within a year." BURROUGH, J., says, "This question has long since been set at rest, and I hope will not be again disturbed."

These cases show very conclusively that the construction placed upon the English statute is, that contracts, the performance of which are dependent upon a contingency that may happen within a year, are not within its operation; and also that the death of a party is such a contingency that a contract, dependent thereon for its performance, is not within the statute.

The same doctrine is recognized in *More v. Fox*, 10 Johns. 244; *McLees v. Hale*, 10 Wend. 426; *Plimpton v. Cruks*, 15 Wend. 336; *Lockwood v. Barnes*, 3 Hill 128; *Archer v. Zeh*, 5 Hill 200; *Russell v. Slade*, 12 Conn. 455; *Blake v. Cole*, 22 Pick. 97.

In *Lockwood v. Barnes*, BRONSON, J., says: "When, by its terms, the agreement is not to be performed one year from the time it is made, it must be in writing, or it will be void. But if

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the agreement be such that the time for performance *may*, although it is highly improbable that it will, arrive within a year, the case is not within the statute."

The supreme court of this State has put substantially the same construction upon our statute. The case of *Hinkley v. Southgate*, 11 Vt. 428, was brought upon a contract that could be fully performed only at the expiration of one year from a then fixed future period. This the court held to come clearly within the statute, but in delivering the opinion, REDFIELD, J., cites the case of *Fenton v. Embler*, and recognizes the doctrine therein laid down. He says, "It is, doubtless, true that the statute does not extend to any case where the time of performance is uncertain, but is expected to come, or may probably come, within one year."

In *Sherman v. the Champlain Transportation Co.* 31 Vt. 162, the contract was one that by its terms would extend through an indefinite period of years, unless terminated by the act of one of the parties, who had the right to terminate it when he chose. By the terms of the contract it is evident the parties contemplated it would continue through a period of years, as it did, in fact. But the court held it not to be within the statute. The learned judge, in delivering the opinion, says—"It seems to us very certain, that to the class of cases to which this case properly belongs, that is, when the consummation of the contract depends upon the election of one party, or any other contingency which may happen within the year, the statute of frauds has no application."

But it is said there is a distinction in this respect between a contract, where the period of performance depends upon the will of the party, and over which he has a control, and one where it depends upon the death of the party; and the case of *Tolley v. Green*, 2 Sanford Ch. R., is referred to, in which the chancellor says—"It is settled that a parol agreement, which may be performed within a year, is not within the statute. But I believe that there is no reported case which decides that a contract which cannot be performed within a year, except upon a contingency which neither party, nor both together, can hasten or retard, such as the death of one of them, or of a third person, is not within the statute. The possibility of performance in the adjudi-

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cations rests upon human effort or volition—not upon providential interference.” And he cites in support of the position many of the cases above referred to, and among them *Fenton v. Emblar* and *Wells v. Horton*, in both of which the death of three of the parties were the very contingencies on which the performance depended, and in the other cases so cited, no allusion whatever is made to any such distinction.

Such a distinction is directly at variance with the English decisions above referred to, and no allusion is made to any such distinction in the cases in this State, and I am wholly unable to see upon what ground such a distinction can be based. The event is clearly no less uncertain as to time in the latter than the former case; the party may terminate the contract, and complete its performance during the year; by omitting to do so, it may become fixed and permanent, extending in its operation not only through the lifetime of the party, but through all time. In the former case the event must happen at some time,—the period must arrive when the contract, according to its terms, is to be performed and completed, and this event may as naturally happen within a year as at any other period, and is one that from its very uncertainty all may look upon, as it may happen within the year.

The judgment of the county court is affirmed.

C. W. WILLARD, *Survivor*. v. GEORGE W. COLLAMER.

Book Account. Jurisdiction.

When payment is made on book, and credited on the account, the debit side of the book will remain unchanged; otherwise, if, by the agreement of the parties, the balance due be transferred to a new account.

The case of *Strong v. Fish*, 13 Vt. 277, approved.

BOOK ACCOUNT. It appeared from the auditor's report, that the plaintiff and Ferrand F. Merrill formed a law partnership in March, 1854, and that the plaintiff's account accrued during

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that time. Twenty-two of the items charged in the plaintiffs account were for services rendered by the employment of the defendant in the action of ejectment; but it was claimed by the defendant that one Ira S. Town, his grantor, should pay these charges to the plaintiff, as he was liable to the defendant therefor; and it appeared that before the commencement of this suit, Town did pay said items to Merrill & Willard, amounting in all to \$149 68. The plaintiff's entire account against the defendant, including said twenty-two items, amounted to about \$190 00. This payment by Town was credited on the plaintiff's account. Subsequent to the payment by Town, the plaintiff handed to the defendant a bill, of which the following is a copy, as the account due from him:—

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To term and att'y fee—self v. Chandler,	\$5 00
Service of writ—same case,	2 80
Paid Clerk, do.,	1 06
To time and trouble, in matter, Langdon v. Dumas,	3 00
To bill of cost—foreclosure, v. Langdon & Tyler,	25 00
To writ, &c.—self v. Davis,	1 00
Service of same,	90
To bill of costs in 3 suits, v. J. C. Paddock—\$2 67 each,	8 01

The defendant, at the hearing before the auditor, and also in the county court, claimed that the county court had not original jurisdiction of the suit, for the reason that the debit side of the plaintiff's book was less than \$100 at the time the suit was brought.

It further appeared from the report of the auditor that, in 1850, Mr. Merrill, afterwards of the firm of Merrill & Willard, applied to the defendant to help him to money to take up a mortgage, held by one J. R. Langdon, upon his house, amounting to \$1,600, and to take a new mortgage for the same, running directly to himself, and offering the defendant to pay him nine per cent. for the use of said money; that the defendant did take up the Langdon mortgage as requested, and took a new mortgage, running to himself; and that Mr. Merrill paid the defendant six per cent. thereon, though he offered to pay the defendant more. After the decease of Mr. Merrill, the defendant sold the

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mortgage, and received the principal and 6 per cent. interest thereon.

It further appeared that at a time subsequent to the payment of the Langdon mortgage by the defendant, Mr. Merrill requested the defendant to purchase some notes against him, secured by mortgages, amounting to about \$1300, and agreed, if he would do so, to pay him 9 per cent. for the same, or make it as good as 9 per cent. to him; that the defendant made the purchase, relying upon this agreement; and after keeping the notes and mortgages, so purchased, a while, at the request of Mr. Merrill, sold them at a discount of twenty-five dollars; and this occurred before the formation of the partnership with Mr. Willard.

It further appeared that before this account in offset of the defendant accrued, Mr. Merrill agreed with the defendant that he would perform professional services for him, in payment for his services in raising the money to take up the mortgages aforesaid; and also that since the defendant's account accrued, and after the formation of the partnership between Merrill and the plaintiff, Merrill agreed with the defendant that his services should apply towards the defendant's account; but it did not appear that Merrill made any arrangement with the plaintiff to that effect. But the plaintiff, in the life-time of Merrill, and after the dissolution of the co-partnership, told the defendant that any way he could settle the account with Merrill would be satisfactory to him; and after the dissolution of the firm, Mr. Merrill again agreed that the plaintiff's account should apply towards the 9 per cent. and other items charged in the defendant's account.

The county court, March term, 1861, PECK, J., presiding, rendered judgment in favor of the plaintiff for the largest sum found by the auditor, to which decision the defendant excepted.

Wing, Lund & Taylor, for the defendant.

Timothy P. Redfield, for the plaintiff.

ALDIS, J. I. The account as originally charged on the plaintiff's book was about \$190. This remained the debit

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side of the book while that account was open. If that had been balanced and closed by agreement of the parties when Town paid the \$149, and the balance (\$48.64) had been transferred to a new account, then such balance would have been the debit side of the plaintiff's book. But Town's payment was simply credited on the account, and the account left open and not settled and closed; hence the debit side remained as before; and the jurisdiction of the county court is sustained. *Reed v. Talford*, 10 Vt. 568.

II. The defendant sold the notes and mortgage which he had bought for Merrill to Trow, at Merrill's request, and at a discount of \$25. It seems obvious that Collamer ought not to lose the \$25, when the act which produces the loss is done not for himself but for Merrill. We think he is to be regarded in the sale as acting for Merrill—as his agent. It is a just debt as against Merrill, and was so regarded by him, for he agreed to pay for it in professional services.

Is it a proper offset on the account of Merrill & Willard?

Before the partnership was formed Merrill promised the defendant to pay him in professional services. After Merrill & Willard were partners, and the defendant had employed them in the business here charged, Merrill again agreed that their account should apply on the defendant's debt; and both Merrill and the defendant conversed with Willard and he fully assented to the arrangement. Thus we have the prior agreement of one partner that this debt should be paid in professional services. We may well infer that the firm was employed to render the services by the defendant upon the faith of this promise, and we have the subsequent assent of all the parties to this prior agreement of Merrill.

The cases of *Fay et al. v. Green*, 1 Aik. 71, and *Strong v. Fish*, 13 Vt. 277, go quite beyond this. See the dictum also in 17 Vt. 237. Here the subsequent assent of Willard may be regarded as fully ratifying the previous agreement of Merrill. It is not necessary for us, therefore, to inquire whether one partner can apply the partnership property to pay his private debt without the assent of his co-partner, or what is the extent and what the limits of the rule on that subject.

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Upon this basis the plaintiff would be entitled to recover only the \$32.14 and interest from April 1, 1861.

The other charges in the defendant's account for raising money on the Langdon and Trow mortgages seem, upon the auditor's finding, to be merely charges to cover usury, and are not allowed.

Judgment reversed as to the larger sum, and judgment for the \$32.14 and interest from April 1, 1861.

GUSTAVUS A. CADY v. DAVID OWEN.

Impeachment. Estoppel. Exceptions.

The acts of a witness, and also his silence, where good faith requires a disclosure of his knowledge, when such acts and such knowledge are inconsistent with his testimony, may be given in evidence for the purpose of affecting his credibility.

If one stands by and sees his own property sold by another, or dealt with by another, to or with third persons, he is estopped from setting up his own title against persons purchasing, or giving credit upon it, even though his own conduct result from mere carelessness or negligence, and with no real purpose to defraud.

Upon the coming in of the jury disagreed, counsel for the first time requested the court to administer certain instructions; it was held that the court would be justified in disregarding the request. The rule of practice requires that any special requests to charge the jury should be presented to the court at the opening of the argument on behalf of the party making the request.

TROVER for certain property known as "Kane's Arctic Expedition," consisting of three sections of paintings on canvass. Plea the general issue and trial by jury, Windsor County, December Term, 1860, BARRETT, J., presiding.

The plaintiff's evidence tended to prove that, in November, 1858, he was the owner of the property described in this declaration, and that, as such owner, he sold an undivided half of the property to Alonzo C. Moore, under an agreement that the title to the property should remain in him until paid for:

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which contract was afterwards reduced to writing, and the writing was produced in evidence, dated Feb. 4, 1859. The evidence further tended to prove that the plaintiff sold the remaining undivided half of the property to one Reyminton, deceased, since the sale; and that the defendant, as constable, afterwards attached the undivided half of the property which the defendant had sold to Moore, upon a writ of attachment in favor of the administrator of said Reyminton against Moore, and subsequently sold the same on execution in favor of said administrator.

The defendant introduced testimony tending to prove that the sale from the plaintiff to Moore was not conditional, but absolute, and among other testimony, the defendant was called as a witness, and testified that when he attached the property, Alonzo C. Moore, who had been examined as a witness by the plaintiff, and had testified that the sale was conditional, was present, and said that his father owned the property. Said Moore, on his cross examination, having denied it, the defendant offered to prove that Alonzo C. Moore did not, on that occasion, say that the plaintiff owned the property, or mention the plaintiff's name in connection with the property, to which the plaintiff objected; but the objection was overruled, and the defendant so testified, to the admission of which testimony the plaintiff excepted.

The defendant insisted that even if the sale were conditional, as claimed by the plaintiff, yet the plaintiff was estopped from asserting this claim; and upon this point the defendant gave evidence tending to prove that the plaintiff was at Chester at the time of the sale to Reyminton, and that Moore was also there; that negotiations took place between the plaintiff and Reyminton, in respect to Reyminton's making the purchase; that the plaintiff, on that occasion, and during the negotiation, said that he owned an undivided half of the property, and that Moore owned the other half; that Reyminton objected to making a trade for the property, and taking a stranger for a partner; that he enquired as to Moore's responsibility, and was answered by the plaintiff that he was responsible, and was a fine young man, of good habits, and had property in Bethel, and that nothing was said that Moore bought the property conditionally, and had not paid for it; that a trade was then effected between them, and the

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plaintiff gave to Reyminton a bill of sale of an undivided half of the property, in which Moore is described as owning the other half, which bill of sale was dated February 3, 1859; that after the sale, and within a very short time, Reyminton, who was a merchant tailor, furnished a suit of clothes to Moore upon credit, and that upon that account and other deal the suit was predicated in favor of Reyminton's administrator against Moore, in which the defendant, as an officer, made the attachment and sale in question.

The evidence tended to show that Moore was wholly destitute of property, and insolvent at the time of the trade between Reyminton and the plaintiff, and that the plaintiff knew it.

The court charged the jury that if the plaintiff represented to Reyminton that Moore was the absolute owner of the undivided half of the panorama, and he knew, or had good reason to believe, that Reyminton was relying on that fact as the ground of credit to be given to Moore by Reyminton for the goods sold to him, and Reyminton did rely on the fact as thus represented, and by reason of such reliance gave credit to Moore for the goods sold to him, the plaintiff could not now be permitted to deny the truth of such representations, and hold the undivided half of the panorama, as against the attachment; that in order to constitute an estoppel, as claimed in behalf of the defendant, the jury must find from the evidence the representation to have been made as is claimed by the defendant; that the plaintiff knew, or had good reason to believe, that Reyminton was relying on this fact being as thus represented, as the ground of the credit that Reyminton was about to give to Moore for goods to be sold to him; that in selling the goods to Moore and giving the credit on which the property in question was attached, Reyminton did it in reliance upon the truth of such representations made by the plaintiff,—so that now to permit the plaintiff to claim and hold this property against the attachment on the debt of Reyminton against Moore, would be in bad faith, and operate as a fraud on Reyminton.

The court charged the jury in all other respects required by the case as it stood upon the evidence. No exception was taken to the charge, when the case was submitted to the jury. The jury retired for consultation and to make up their verdict. After-

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wards, without having agreed, they came into court, and through their foreman stated to the court that the jurors were in some disagreement as to what the court charged on the subject of the estoppel claimed by the defendant, and wished to have the charge on that subject repeated. Whereupon the court restated the instructions as above set forth, with some illustrations to make them understood and to show their application.

Having so done, the court was requested by the plaintiff's counsel to instruct the jury that in order to have the representations of the plaintiff operate as an estoppel, the jury must find that they were made with the fraudulent intent on his part to deceive and mislead said Reyminton. The court declined so to do. To which the plaintiff's counsel took exceptions.

The jury returned a verdict for the defendant.

Washburn & Marsh, for the plaintiff.

William Rounds and Luther Adams, for the defendant.

POLAND, CH. J. It does not appear from the exceptions in the case whether the plaintiff's witness, Moore, was or was not enquired of, on his cross examination, whether, at the time the property in question was attached by the defendant, he (Moore) said anything in reference to the plaintiff's being the owner of it. He had testified that the property belonged to the plaintiff. The defendant offered to prove that on that occasion Moore said nothing in relation to the plaintiff's being the owner. The plaintiff objected to this, but it does not appear that he objected on the ground that Moore was not enquired of on his cross examination, and we must therefore regard it as an objection to the general nature of the fact offered to be proved, whether that was a fact having any legal tendency to discredit the evidence of Moore given for the plaintiff.

If the plaintiff's objection to the evidence was that the enquiry had not been put to Moore, he should have raised that to the court. Such preliminary enquiry, when necessary to be made, may be waived or not insisted upon, and if not insisted upon, may properly be regarded as waived. It might have been a long time

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after Moore testified, before this evidence was offered, and the presiding judge could not be expected to keep in memory whether the question had been put to him or not. If the objection was not placed on that ground, he might well suppose the question was put, or that the party waived it, and that the objection only applied to the general character of the evidence offered. The objection that the preliminary enquiry was not put, ought also to be stated, so that the defendant might obviate it by thus recalling the witness and making the enquiry.

The counsel have discussed the question whether this was a case where the preliminary enquiry was necessary if it had been required, but as we think the question not properly raised, and as we are not entirely unanimous in our views of it, we leave it undecided. The tendency of the evidence objected to was, that Moore stood by and kept wholly silent and allowed the defendant to seize and take away the property to satisfy his debt, when in fact it belonged to the plaintiff, as he has sworn upon the trial. The defendant insists that if it had been true that the property belonged to the plaintiff, and defendant attempted to take it upon an attachment against Moore, that he would naturally have disclosed it, and that as a fair and reasonable man he was bound to do so, for the safety and protection of the plaintiff, and to save him, as well as the attaching creditor and officer, from litigation and difficulty, and that as he did not, his conduct was inconsistent with his testimony, and therefore tends to cast some suspicion and doubt upon its truth.

As a matter of common experience, we are all aware that men generally are averse to having even their own property attached upon their debts, and many will even assert ownership in another to prevent it, and when it does in fact belong to another, we could hardly expect the debtor to stand silently by and see it seized for his debt. We think no fair-minded, honest man would feel justified in doing so, and if the defendant satisfied the jury that Moore did so, that his conduct was so far inconsistent with his testimony as to be admissible for the jury to weigh in connection with it.

The charge of the court to the jury seems to have been satisfactory, and no exception was taken; but upon the jury coming

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into court not agreed, and asking the court to repeat the instructions, the plaintiff's counsel requested the court to instruct the jury "that in order to have the representations of the plaintiff operate as an estoppel the jury must find that they were made with the fraudulent intent on his part to deceive and mislead said Reyminton." This request was made at a time when the court below would have been fully justified in wholly disregarding it, and the plaintiff entitled to no exception for such refusal. The rule of practice requires that any special requests to charge should be presented to the court by the opening of the argument for such party, and though this is not always very rigidly enforced, yet to allow a party under the circumstances of this case, after the jury had been in consultation on the case, and returned into court disagreed, when the court could have no reasonable time or opportunity for reflection or consideration, to present new requests for instructions, would be wholly intolerable, and it should never be permitted.

From the exceptions in this case, however, we understand the presiding judge to have allowed an exception to the refusal of the court to charge according to the request, so that the soundness of the proposition embraced in the request is before us. We are of opinion it cannot be sustained; that if one stands by and sees his own property sold by another, or dealt with by another, to or with third persons, he is estopped from afterwards setting up his own title against persons thus purchasing, or giving credit upon it, even though his own conduct result from mere carelessness or negligence, and with no real purpose to defraud. So if it be done consciously and purposely, but the party at the time really intends not to assert his own title to the property against such third person, his purpose could not be said to be fraudulent; the fraud consists in the subsequent attempt to set up a title he has once disavowed, and upon which another has acted.

Judgment affirmed.

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NOBLE H. HILL v. E. A. NORTH.

Principal and Agent. Breach of Warranty. Evidence.

When one is not merely a messenger for the principal to receive proposals for a trade, but fully negotiates a trade and pays part of what is to be the price, if the principal approves the trade, and the bargain is completed by the principal substantially upon the terms the agent has thus agreed upon, the principal will stand charged with knowledge of whatever was communicated to such agent in the course of the negotiation.

A general warranty does not cover defects that are perfectly visible and obvious to the senses, and known to the party taking the warranty.

Where it was conceded that the defect complained of, so far as it was obvious and visible, was known to the purchaser or his agent, but it appeared that the seller represented that it did not injure the horse or affect him in the slightest degree, and the purchaser or his agent did not believe and had no reason to believe the defect was anything more than a mere blemish which would never render the horse less useful or capable of service; and the testimony tended to prove that in point of fact the defect was a real unsoundness at the time of the sale; it was held, that this was one of those equivocal defects that a warranty may well be considered as taken to guard against.

The rule excluding from a warranty such defects as are known to the purchaser, only applies to such as are perfectly obvious to the senses, and the effects and consequences of which may be accurately estimated, so that no purchaser would expect the seller intended to warrant against them; but all other defects, though apparent to some extent, but still equivocal and doubtful in their character, as to whether they are permanent or temporary, or mere harmless blemishes, or but partially developed unsoundness, must be understood to be included and covered by a general warranty.

A witness may state what a third person said, for the purpose of identifying a particular occasion or date.

ACTION ON THE CASE for the breach of a written warranty in the sale of a horse. Plea, the general issue and trial by jury, June term, 1860, Addison County, PIERPOINT, J., presiding.

On trial the plaintiff gave in evidence a written instrument, signed by the defendant, of which the following is a copy:

“Bridport, Vermont, May 21, 1857.

Noble H. Hill, Boston, Mass.,

Bo't of E. A. North,

Champlain, New York,

A Black Hawk Stallion, called “*Rip Van Winkle*,” which will

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be five years old July 18, 1857, and which I warrant sound and kind in every respect, for \$2750.00.

Received twenty-seven hundred and fifty dollars.

E. A. NORTH.

May 21st, 1857."

The plaintiff's evidence further tended to prove that David Hill, the father of the plaintiff, who resided at Bridport in this state, at some time previous to the date of the above written instrument, went to Champlain, New York, where the defendant resided, and, as agent of the plaintiff, entered into negotiations for the purchase of the horse in question; that he arrived there late on Saturday evening, and on the following day saw the horse and made some slight examination of him, and noticed the quarter cracks hereafter mentioned, and a small bunch on the knee joint of the right fore leg; also that he saw the horse rode and driven near evening, when it was too dark for a close examination; that after considerable debate the defendant offered to sell the horse for twenty-seven hundred and fifty dollars; that said David, as agent for the plaintiff, thereupon gave the defendant fifty dollars, and agreed with him to bring the horse to Bridport on a subsequent day, where the plaintiff would meet him, and then, if the plaintiff should conclude to buy the horse, he would pay the defendant money enough to make, with the fifty dollars advanced, the sum of one thousand dollars, and would give such notes for the balance as the plaintiff and defendant might agree upon; that if the plaintiff did not trade for the horse the defendant might retain the fifty dollars so advanced for his trouble in bringing the horse to Bridport; that on the 21st day of May, 1857, the defendant brought the horse to Bridport, where he met the plaintiff for the first time who then closed the bargain at the price of twenty seven hundred and fifty dollars, and paid nine hundred and fifty dollars in money, and gave satisfactory notes for the balance, and that thereupon the defendant executed the bill of sale and warranty above set forth; that on this occasion the plaintiff remained at Bridport but a short time—not more than an hour—and made little or no examination of the horse, returning the same day to Boston, where he resided.

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The plaintiff's evidence further tended to prove that the horse, after the sale and purchase, was left by him with David Hill; that within a day or two after the sale David Hill discovered on the two hind feet of the horse, what are termed cling-fasts, or ring-bones, and also an enlargement of one of the gambrel joints; and the plaintiff gave other evidence tending to prove the existence of these ring-bones and this enlargement of the gambrel joint at the time of the sale, and that each of these constituted an unsoundness.

The plaintiff's evidence also tended to prove that the quarter-cracks before mentioned constituted unsoundness in the horse; but, in respect to these quarter-cracks, it was proved that at the time of the negotiation and trade they were spoken of by David Hill and the defendant, and David Hill testified that he said to the defendant he did not care much about them as they could be cured, and it appeared that they were cured within a year after the sale.

The plaintiff's evidence also tended to show that the bunch upon the right fore leg was an unnatural deposit of bone, which some of the witnesses called a splint, and that it constituted an unsoundness at the time of the sale, and that both of these defects last named materially lessened the value of the horse.

As to the bunch on the fore leg, the plaintiff introduced as a witness Dr. Dadd, a veterinary surgeon, who testified that he saw the horse first in September, 1858, and again in December, 1859; that the excrescence on the fore leg was of a bony or cartilaginous character, and as such would constitute an unsoundness; that it was about as large as the half of a walnut, and he thought had increased in size some from 1858 to 1859; that it might have been the result of an accident, and might interfere with the free action of the knee joint. David Hill testified that there was a bone projecting from the knee of the horse; that it was on the right fore leg, and stuck out a half an inch, on the outside of the leg; that he saw and spoke of it to the defendant at the time of the negotiation at Champlain, and that the defendant said it had always been there and did not injure him. David Hill also testified that this bone affects the walking of the horse, and shows a weakness of the joint; that

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he thought this bone did not increase in size after he was purchased, but that it might have done so a little. It was not claimed on either side that this leg was affected by any cause other than this bunch and the quarter-cracks.

The evidence further showed, and on this point was uncontradicted, that in September, 1858, the horse had large deposits of bone, of an unnatural character on his hinder feet, known as ring-bones, and a large spavin on the gambrel joint, at the points indicated in the testimony of David Hill, as stated above, but it was claimed by the defendant that these did not exist at the time of the sale.

The evidence given by the defendant in person, and other witnesses in his behalf, tended to prove that the horse was examined by David Hill at Champlain, in a much more thorough manner than stated by him; that he saw the horse rode and driven, and that the horse was also examined by one More, who was well acquainted with horses, and was taken by David Hill to Champlain for the purpose of making such examination; that David Hill had great experience and skill in regard to horses; that all the negotiations were conducted by David Hill at Champlain in his own name, and without reference to the plaintiff; that the price was there agreed upon; that the defendant agreed to deliver the horse at Bridport, where David Hill agreed to receive him, pay nine hundred and fifty dollars in money, in addition to fifty dollars which he then paid, and give notes signed either by the plaintiff, or Mr. Fletcher of Bridport, having not more than a year to run, for the balance; that the defendant understood he was contracting with David Hill as principal, and not as agent for the plaintiff, and that during the interview at Champlain nothing was said about any warranty of the horse as to soundness or otherwise; that the defendant met the plaintiff for the first time at Bridport, when he took the horse there; that the plaintiff was at Bridport when the defendant arrived there, where the plaintiff remained over night and until some time the following day, and examined the horse and noticed the quarter-cracks. There was no evidence, however, tending to show that the plaintiff ever saw or noticed the bunch upon the fore leg or any other defect or unsoundness in the horse, except

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the quarter-cracks, previous to the sale. The defendant's evidence further tended to show that after the plaintiff had looked at the horse, the bill of sale of May 21, 1857, was executed, and the plaintiff paid nine hundred and fifty dollars in money and endorsed to the defendant David Hill's five notes for three hundred and fifty dollars each, for the balance, the first payable six months after date, and the others payable severally at the end of each three months thereafter; and that the papers were then exchanged.

The defendant's evidence tended also to prove that the bunch on the fore-leg and the quarter-cracks were not upon the horse when foaled, but the bunch first made its appearance when the horse was about two years old, and the quarter-cracks about a year after; that at the time of the sale, the bunch was not readily discoverable, and was about as large as a small pea, and did not at that time or ever in the slightest degree injure or affect the horse; that it was spoken of by the defendant in the presence of David Hill in the interview at Champlain, and that it was there claimed by the defendant that the same constituted no injury to the horse whatever, and it appeared that so far as the defendant knew, it did not injure him. The defendant's evidence tended further to prove that the horse was in all other respects sound at the time of the sale, and that both David Hill and the plaintiff supposed the horse sound in all other respects at the time of the sale. The evidence of the plaintiff further tended to show, that the bunch upon the fore leg and the cling fasts were unnatural deposits of a bony character, and proceeded either from some hereditary predisposition to such a disease, existing in the animal or from some straining or over exercise; that such deposits were generally slow in their growth and development; that the horse, ever after he was purchased by the plaintiff, was used in the most careful and prudent manner, and was never strained, over exercised or driven at a high rate of speed, but that on various occasions before the sale, commencing when the horse was only eighteen months old, and continuing down to the time of the sale, when he was five years old, he had been driven at a high rate of speed in sundry races and matches, as they were called, and as fast as he could possibly be driven, and

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in such a manner as was calculated to strain him. It also appeared that David Hill knew of these performances in the way of extra speed, and that the character of the horse in this respect constituted an inducement to him to purchase, and that he procured of the defendant certificates of the speed of the horse, that were subsequently published in the plaintiff's advertisements of the horse.

The evidence of the plaintiff also tended to prove that he bought the horse, as the defendant knew, for a stock horse, and that by reason of the defects and diseases above referred to, he was of little or no value to the plaintiff as a stock horse, or for any other purpose, and was not in fact worth over one hundred dollars, but that if the horse had been sound in every respect, his value would have been fully equal to the sum paid upon his purchase.

The plaintiff called Isaac Williamson for the purpose of rebutting the testimony of the defendant, as to the length of time the plaintiff was at Bridport when the sale was made, who testified that in the month of May, 1857, he let the plaintiff a horse to drive from Middlebury to Bridport and return, on which occasion he was not gone over night, nor more than three hours, (Bridport being about eight miles from Middlebury.) In answer to a question put by the defendant's counsel, the witness stated that he had let horses to the plaintiff more than once in the spring and summer of 1857, to drive to Bridport. For the purpose of identifying this as the time when the horse in question was purchased, the plaintiff's counsel offered to show that when he hired the horse on this occasion he stated that he was going to Bridport to buy the horse in question, and that on his return he stated that he had bought him. This was objected to by the defendant as hearsay and excluded by the court on that ground, to which the plaintiff excepted.

There was no evidence tending to show that the defendant at the time of the trade had any knowledge of any unsoundness in the horse, except the quarter-cracks, and bunch on the knee referred to, or any knowledge in relation to them, except such as was communicated to or known to David Hill at the time the trade was negotiated at Champlain,

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The plaintiff requested the court, among other things, to charge the jury :

1. That the warranty being against all unsoundness, whether patent or otherwise, if the plaintiff proved to the satisfaction of the jury that *any* unsoundness existed in the horse at the time of the sale, the plaintiff was entitled to recover such damages as were occasioned by such unsoundness ; and that the warranty in the case being in writing and its execution admitted by the defendant, if the jury found that the horse had quarter-cracks and the bunch on the fore leg, as the evidence tended to prove, at the time of the sale, and that said quarter-cracks and bunch, or either of them, constituted an unsoundness, the plaintiff was entitled to recover, even though these unsoundnesses were pointed out to and observed by the plaintiff previous to the sale.

2. That the warranty covered every such unsoundness, although it may have been noticed by David Hill or the plaintiff, if the jury find that the same was not apparently an unsoundness, and that both David Hill and the plaintiff believed the defects observed, viz : the small bunch upon the knee and the quarter-cracks, were not an unsoundness.

3. That if David Hill and the plaintiff were induced so to believe from the representations of the defendant, their observation of these defects cannot limit or qualify the meaning of the warranty as covering such defects, if the same were in fact an unsoundness.

4. That although David Hill and the plaintiff may have observed these defects, and had reason to believe the same to be an unsoundness, the warranty extends to them nevertheless, if the defendant at the sale, represented and claimed that the same were not unsoundnesses, and if, in fact, either of them was an unsoundness.

5. That the evidence as to the examination of the horse made by David Hill at Champlain should be laid out of the case, as affecting the construction of this warranty.

But the court, upon other branches of the case having charged in a manner satisfactory to the plaintiff, declined to charge as requested, any farther than herein stated, but, in respect to the plaintiff's claim, that he should not be affected by any notice of

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the unsoundness of the horse in question received by David Hill during the interview at Champlain, told the jury that, it being conceded that David Hill was the plaintiff's agent in making the negotiations relative to the horse at Champlain, if the jury should find that the sale was so far completed at that place, that the price of the horse, and the time and manner of payment for him were agreed upon, and the defendant promised to deliver him at Bridport, in pursuance of such agreement, and the terms of the trade were then agreed upon, as the evidence tended to prove, and the defendant and the plaintiff met at Bridport to close the contract, which had been so agreed upon at Champlain by David Hill, as the plaintiff's agent, and the trade was there consummated, and thereupon the price was paid and the horse was delivered as had been previously agreed, and the defendant then executed the bill of sale in question to the plaintiff, in that case, any notice or information in relation to the horse received by David Hill, at Champlain during the negotiations there, would affect the plaintiff in the same manner as though such notice or information had been received by himself, though he had no such notice or information in fact. But that if the negotiations at Champlain were merely preliminary, and no agreement for the sale of the horse was made there, but the terms of the sale were merely talked over there, and the contract and sale was made when the parties met at Bridport, in that case the plaintiff would not be affected by notice given to David Hill at Champlain, unless such notice was shown to have been communicated in fact to the plaintiff.

And as to the effect, which the fact, that David Hill saw the quarter-cracks and bunch upon the fore leg of the horse at Champlain, should have upon the question of the defendant's liability, the court charged in substance, that in this action the plaintiff sought to recover damages for a deceit which he claimed had been practiced upon him by the defendant; that the defendant warranted the horse to be sound; that if he was unsound at the time of the sale, proof of that fact entitled the plaintiff to recover, provided he was deceived in reference thereto in consequence of his ignorance of such unsoundness; but for the purpose of this trial the court charged, that the plaintiff could not

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recover on account of the existence of any defect of which the plaintiff was aware at the time of the sale; that although a defect existed, if the defendant could show that the plaintiff knew at the time of the sale, the plaintiff could not recover; that the rules governing this case were substantially the same as they would be if the action were for falsely and fraudulently representing the horse to be sound, (the court explaining what those rules were,) except that in this case the plaintiff need not prove that the defendant knew of the unsoundness, and that as no question was made by the plaintiff but that David Hill saw the quarter-cracks and the bunch on the fore leg during the interview at Champlain, the jury would lay the consideration of the quarter-cracks and this bunch entirely out of the case, if they found under the charge, that the plaintiff should be affected with such knowledge of David Hill.

The jury returned a verdict for the defendant. To the foregoing decision of the court, the omission of the court to charge as requested, and to the charge as given, the plaintiff excepted.

Linsley & Prout, and *D. Roberts*, for the plaintiff.

F. E. Woodbridge and *E. J. Phelps*, for the defendant.

POLAND, Ch. J. We have not been furnished with a copy of the plaintiff's declaration, but it is agreed that it is in the usual form in case for a false warranty, under which the plaintiff might recover by proving either a deceit, or an express warranty, and a breach of it. It is apparent from the exceptions, that the plaintiff at the trial sought to establish his case wholly upon the latter ground, and in that respect, his case was to be made out in the same manner precisely as if his action had been assumpsit on the contract of warranty. The plaintiff proved a general warranty of soundness of the horse by written agreement of the defendant.

The only question in issue then, was, whether the warranty was broken; that is, whether at the time said warranty was executed, there was an existing unsoundness in the horse, that

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was covered by the warranty. The plaintiff claimed that the horse had *ringbones*, and an enlargement of the gambrel joints, at the time. The jury found these did not exist at the time of warranty, which effectually disposed of this claim.

The plaintiff claimed also that the horse was unsound at the time of warranty by reason of quarter cracks, and a bunch on one fore leg; that these were unsoundnesses at the time, and constituted a breach of the warranty. The defendant admitted the existence of both these defects at the time, but denied that either amounted to an unsoundness, but if either of them was so, claimed that it was not covered by the warranty, for the reason that it was fully known and understood by the plaintiff or his agent when the warranty was made. The court charged the jury, that if the trade was made for the horse with the defendant by David Hill, as agent for the plaintiff, then the plaintiff could not recover on account of these defects, as it was conceded that David Hill had notice of them at the time of the trade. A question is made by the plaintiff, as to the correctness of this instruction, in relation to notice to his agent being notice to him. It does not appear from the case what was the extent of David Hill's authority to act for the plaintiff in the purchase of the horse, whether he had authority to complete the purchase or not, but it appears that he was more than a mere messenger to receive proposals; he fully negotiated a trade, and paid what was to be a part of the price, if the plaintiff approved of the trade; and the bargain was completed substantially upon the terms the agent had agreed upon. The closing of the trade by the plaintiff was a consummation of the negotiation by David Hill with the defendant, an acceptance by him of the terms they had agreed upon. David Hill then stood in the place of the plaintiff during the whole negotiation, and what was communicated to him in the course of it, and as a part of it, we think was the same as if the plaintiff had conducted the negotiation in person, and himself received the same information his agent did. The instruction so far we regard correct.

The more important question in the case arises upon the other points of this branch of the charge, in the condition of the evidence on the subject; that as David Hill saw the quarter

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crack, and the bunch on the fore leg of the horse during the negotiation, and before the sale and warranty, they should be wholly laid out of the case.

The express contract of general warranty of soundness in terms covers every existing unsoundness, whether known by the parties at the time of the horse trade or not. It seems somewhat anomalous to make the liability of a party upon an express contract, for a breach of it, to depend upon the fact, whether the party taking such contract, knew at the time that the party was contracting what he could not perform. But it seems to have been established from the earliest history of this class of actions, that a general warranty does not cover defects that are perfectly visible, and obvious to the senses, and known to the party taking the warranty. The illustration generally given in the old books is the sale of a horse with a general warranty of soundness, which has lost one eye, or an ear, or a tail. The reason given why the general warranty does not cover such defects, is because it is presumed that they are not intended to be included in the warranty, being fully known to the parties at the time.

The county court held that this principle applied to this case as to the quarter cracks and bunch on the leg. Was this correct? It was conceded that these defects, so far as they were obvious and visible, were known to the plaintiff, or his agent. So far as the quarter cracks are concerned, there would seem to be but little ground, if any, to find fault with it. The plaintiff's agent saw and examined them, and told the defendant, he did not care much about them as they could be cured, and the plaintiff proved that they were cured in about a year. It does not appear but that they were cured as soon as he supposed they could be, or that this defect proved to be any different or greater, than was apparent to the agent's observation at the time.

The plaintiff's agent also saw the bunch on the fore leg. He testified that it was spoken of between him and the defendant at the time, and that the defendant said it had always been there, but did not injure the horse. The defendant testified that the bunch made its appearance when the horse was about two years old, that it was very small, not larger than a pea, not readily

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discoverable, and had never in the slightest degree injured or affected the horse in any manner, and that he so informed the plaintiff's agent. It does not appear from the case that the plaintiff's agent believed or had any reason to believe at the time, that the bunch was anything more than a mere blemish, which would never render the horse less capable for use or service. The plaintiff gave evidence tending to prove that in fact the bunch was an unnatural deposit of bone, that it constituted an unsoundness in the horse at the time of the sale, and that it affected the walking of the horse, and created a weakness in the joint. Now, conceding that the jury should find the facts proved, in relation to the real character and consequences of this bunch, as the testimony tended to show, (and the plaintiff of course had the right to have the case put to the jury as to this,) could it be truly said that the plaintiff's agent had full notice of this unsoundness? We think not.

It was pointed out to him as a mere blemish, not affecting the real soundness of the horse, and which never had injured him, and from the description of it in the exceptions, probably the most skillful and experienced man could not have determined with certainty which it was. If in truth it was different from what it appeared, and from what the defendant represented and believed it, and was an unsoundness affecting the usefulness and value of the horse, it would be covered by the warranty, and the knowledge which plaintiff had of it, as an entirely different and innocent thing, would not prevent it. This bunch on the horse's leg was one of those equivocal defects that a warranty is taken to guard against by the purchaser.

The rule excluding from a warranty such defects as are known to the purchaser, only applies to such as are perfectly obvious to the senses, and the effects and consequences of which may be accurately estimated, so that no purchaser would expect the seller intended to warrant against them.

All other defects, though apparent to some extent, but still equivocal and doubtful in their character, whether they are permanent or temporary, or whether they are mere harmless blemishes or but partially developed unsoundness, must be understood to be included and covered by a general warranty; and

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warranties are usually asked and given to protect purchasers against the risk presented by such cases.

We are of opinion, therefore, that the court erred in withdrawing this part of the case from the jury, but that the evidence should have been left to them to find, whether this bunch was what it was represented and understood to be at the time of the sale, or whether it was an unsoundness affecting the horse, as the plaintiff claimed it to be, and if the latter, that it would entitle the plaintiff to recover.

We are of opinion also that there was error in excluding what the plaintiff said to Williamson when he hired and returned his horse as to the business he was going to Bridport upon, and what he had been there for. It was offered merely to identify this time of hiring as the one when he made the trade with the defendant, like fixing a date. For this purpose it is common to allow witnesses to refer to what third persons have said, to their having heard of a particular event, &c., to fix the time. Here, coupling what the plaintiff said with the fact of his having the team and making the journey, the declarations and the acts, it was competent evidence to identify this occasion with the purchase of the horse. It is impossible to suppose the plaintiff could have had it in mind then to be making evidence to aid him in a controversy with the defendant, or any one; it was the ordinary, almost involuntary, utterance of a concurrent transaction. If on that day some third person had told Williamson he had been present and seen plaintiff purchase defendant's horse on that day, it would be competent evidence as identifying this occasion as the day he bought the horse.

The early case of *Ross v. Bank of Burlington*, 1 Aik. 43, goes much farther than this in the admission of this kind of evidence.

The judgment is reversed and case remanded for a new trial.

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ABATEMENT.

1. In an action in favor of a person of unsound mind, brought by his guardian, the defendant pleaded in abatement the pendency of a prior suit between the same parties for the same cause of action. The plaintiff replied, that when the first suit was commenced, the plaintiff was under guardianship, and that the guardian did not sue out the writ in that suit, and was not a party thereto, or in any way named it; *Held*, that the plea in abatement, as it did not deny the guardianship, was insufficient to abate the second suit in that it did not allege either that the first action was commenced before the plaintiff was placed under guardianship, or, if after, that it was commenced by the procurement or assent of the guardian. *Lincoln v. Thrall*, 110.

2. *Held*, also, that it was too late to insert these necessary allegations in the defendant's rejoinder to the plaintiff's replication, as a plea in abatement cannot be aided by matters alleged in subsequent pleadings. *Ib.*

3. The declaration in the second suit counted upon a judgment for the sum of five hundred and seventy-three dollars and forty-seven cents damages. The plea alleged that the declaration in the first suit counted upon a judgment for five hundred and twenty-three dollars and forty-seven cents; *Held*, that although it was unnecessary to describe the judgments in the plea, yet having done so, the general allegation contained in the plea, that the two suits were for the same cause of action, which would otherwise have been alone sufficient, would not aid the plea when it appeared by comparison of it with the declaration, that the judgments were for different amounts. *Ib.*

ACCORD AND SATISFACTION.

1. To constitute an accord and satisfaction by the tender and acceptance of money, it is necessary that the money should be offered in satisfaction of the claim, and that the offer be accompanied by such acts and declarations as amount to a condition that if the money is accepted, it is accepted in satisfaction, and such that the party to whom it is offered is bound to understand that if he takes it, he takes it subject to such condition. When a tender is thus made, the party to whom it is made has no alternative but to refuse it, or to accept it in full satisfaction of his claim; and no protest, declaration or demand of his can vary the result, so long as the condition of the tender is insisted on. *Preston v. Grant*, 101.

2. Where the party making a tender upon a promissory note only said that he tendered the sum offered as the balance due upon the note; *held*, that there was nothing in this language that could fairly convey the idea to the party to whom the tender was made, that it was offered upon the condition that if he took it he did so in satisfaction of the note. *Id.*

3. This tender was made to an agent of the owner of the note, who held it for collection. The agent received the money, saying he would take it to the owner of the note, and the latter might do as he had a mind to, and the amount was afterwards indorsed upon the note; *held*, that neither the language nor conduct of the agent, when he received the money, indicated that he understood that if he received the money it was on condition that he should do so in satisfaction of the note. *Id.*

4. *Held* further, therefore, that this transaction did not amount to an accord and satisfaction; but that the tender was one which the party to whom it was made had a right to accept and apply on the note, and sue for the balance claimed by him to be still due thereon. *Id.*

ACTION, COMMENCEMENT OF, *See* TRUSTEE PROCESS 3; STATE 1, 2.

ADDITIONAL COUNTS.

1. An action of general assumpsit was commenced by the indorsee of a promissory note against a prior accommodation indorser, and property was attached by a constable thereon. After the entry of the suit in court, the plaintiff filed an additional count to his declaration, declaring specially upon the note and indorsement, and obtained judgment upon such additional count only. *Held*, in an action against the town for the neglect of the constable to keep the property attached to respond to the execution (the plaintiff's attorney having proved by parol testimony, that the original declaration was made to recover solely upon the note described in the special count,) that the additional count did not introduce a new cause of action, and that the constable was not discharged from his obligation to the creditor to preserve the property attached to respond to the execution. *Austin v. Burlington*, 506.

2. When it does not appear from the record that the new counts are for the same cause of action as the original declaration on the common counts in assumpsit, the burden of proof rests upon the party seeking to establish that they are for the same cause of action; and this may be shown by parol testimony. *Id.*

3. New counts may be filed for the same cause of action. *Hill v. Smith & Carpenter*, 535.

4. Where the contract set forth in the new counts was the same as that described in the original declaration, with the exception that the new counts alleged an enlargement of the time for performance, it was *held*, that the new counts were for the same cause of action, in the sense of the rule applicable to pleading, and the allowance of amendments. *Id.*

5. All that is required is, that the new counts be founded *in fact* upon the same debt, demand, or claim which the plaintiff seeks to recover by his original declaration. *Id.*

6. And where a recovery is had upon the new counts alone, the rule of damages will be the market price of the commodity at the time of the refusal to deliver it, under the terms of the new stipulation enlarging the time for performance, and not the market price at the time it was to have been delivered by the terms of the contract as set forth in the original declaration. *Id.*

7. In this case, the defendants, before the new counts, upon which alone the plaintiff recovered, were filed, paid into court a sum of money sufficient to satisfy all the damages the plaintiff could have recovered under the original declaration, and costs to the time of such payment, and the plaintiff took the same; it was *held*, that in the absence of proof that the plaintiff took the money in satisfaction of his claim, he was not thereby precluded from filing new counts, and recovering an additional sum thereon. *Id.*

AGENT, *See* PRINCIPAL AND AGENT.

AMENDMENT, *See* ADDITIONAL COUNTS; REFERENCE 5, 6.

ANIMALS, RESTRAINT OF, *See* HIGHWAY.

APPEAL, *See* GRAND LIST.

APPURTENANCES, *See* DEED 12.

ARBITRATION, *See* REFERENCE 1, 2.

ARREST, *See* FALSE IMPRISONMENT, 1, 2.

ASSIGNMENT FOR THE BENEFIT OF CREDITORS, *See* TRUSTEE PROCESS, 1.

ASSOCIATION, *See* CORPORATION 7.

ASSUMPSIT.

Whether an indorsee of a promissory note can maintain assumpsit upon the general money counts against a prior indorser, known to be an accommodation indorser when the note was negotiated, *quere.* *Austin v. Burlington*, 506.

See BILL OF EXCHANGE 1; SALE 1, 2, 3.

ATTACHMENT.

If one, who has two cows at the time one of them is taken under a writ of attachment, sues the attaching officer in trespass, on the ground that the cow taken was his only cow, and therefore exempt from attachment under the statute, supposing at the time that the other cow in his possession belonged to his deceased wife's estate, he cannot, on failing to establish the latter fact, change the ground of his action by claiming the right to elect which of the two cows should be treated as exempt. Such right of election, if it existed at all, must, under the circumstances, be regarded as having been waived, as he did not attempt to exercise it at the time of attachment. *Sumner v. Brown*, 194.

See OFFICER 6, 7, 8; TRUSTEE PROCESS 1.

AUDITA QUERELA, *See* EXECUTION 3.AUDITOR, *See* RELATIONSHIP 1, 2.

BAILMENT.

1. Livery stable keepers, and others who let horses and carriages for hire, are answerable to the hirer for injuries which happen by reason of defects in carriages, which might have been discovered by the most careful and thorough examination, but not for an injury which happens in consequence of a hidden defect, which could not, upon such examination, have been discovered. *Hadley & Wife v. Cross*, 586.

2. In a business involving the personal safety and lives of others, due care and reasonable diligence are nothing less than the most watchful care and the most active diligence. *POLAND, CH. J. Ib.*

See OFFICER 4, 5, 8; RECEIPTOR 1, 2, 3.

BANK DIRECTOR.

1. M. having been elected director of a bank in 1849, gave at that time a bond with sureties, conditioned for the due performance of his duties as director "while he should be a director of said bank." He was annually re-elected and acted as a director for several years afterward, but never gave any other bond. *Held*, that the bond did not cover his official defaults occurring after the expiration of the term of office under his first election. *State Treasurer v. Mann et al.*, 370.

2. *Held*, also, that notwithstanding the statute forbade any bank director from entering upon the duties of his office until his bond had been executed and approved, and also provided that a director should hold his office until another was appointed and qualified, nevertheless the office was to be considered an annual one, and M. was to be regarded as acting as director each year under his last preceding election. *Ib.*

BILL OF EXCHANGE.

1. The drawees of two bills of exchange, residing in the State of New York, procured them to be discounted at the plaintiff's bank in Vermont, through an agent of the bank in New York. The other parties to the bills were mere accommodation parties for the drawees, and the money was obtained on the bills by the drawees, for their own use, they assuring the agent of the bank at the time the bills were left with him, that they should be paid; but no written acceptance was made on the bills by the drawees as required by the laws of New York, to bind a party as an acceptor; *Held*, that the bank was entitled to recover the amount of the bills from the drawees in an action upon the general counts in assumpsit, as for money loaned upon deposit of the bills as collateral security. *Bank of Rutland v. Woodruff et al.*, 89.

2. Where the drawee of a bill, not accepted by him in writing, has it in his possession and procures another to discount it, or advance the money upon it to him, the law in this state would from that fact imply an acceptance of the bill by the drawee, without any express language to that effect; and where

the drawee resides in another state, and procures the presentment of the bill for discount, and the money upon it in this state, through an agent of the party discounting, the effect would be the same. *POLAND, Ch. J. Ib.*

3. It is not essential to the validity of a bill of exchange or promissory note, that it be negotiable. *Arnold v. Sprague, 402.*

4. The order in this case held to be a bill of exchange. *Ib.*

5. Bills of exchange are presumed to be upon a sufficient consideration, and may be accepted by parol. *Ib.*

6. The taking a bill of exchange on a previous indebtedness is *prima facie* a payment of the debt. *Ib.*

7. After acceptance the drawee cannot set up as against the payee, that as between him and the drawer there was no consideration. *Ib.*

8. Where one accepts a bill in order to enable the drawer to obtain credit or money, though there is no consideration between the drawer and acceptor, and though the subsequent holder for value knows it to be accommodation paper at the time he takes it, he can enforce it against the acceptor. *Ib.*

9. A debt from the drawer to a third person, is a good consideration for the acceptance of a bill of exchange. *Ib.*

10. Parol evidence is not admissible to vary the legal effect of a bill of exchange, or to add a party to it, who does not appear on its face. *Ib.*

11. If an agent sign only his own name whether as drawer, indorser or acceptor, he will be considered as principal, and be personally liable as such, unless he adds some restrictive or qualifying words, and this though his agency was known to the other party. *Ib.*

12. It is well settled that the use of the word "agent" alone, without saying for whom he is agent, is not sufficient to relieve the agent from responsibility, or to bind the principal. *Ib.*

BOND, *See BANK DIRECTOR 1, 2.*

BOOK ACCOUNT.

When the auditor reported that certain items of account presented before him by each party were not charged by either of them at the time they accrued, but that they were considered and made even by them at the time, it was held that the finding of the auditor must be treated as conclusive. *Bacon v. Vaughn, 73.*

See JURISDICTION 2.

CASE, *See FRAUDULENT REPRESENTATIONS 1, 2, 3; HIGHWAY 3, 4.*

CHANCERY.

1. When two mortgages on the same property, one in favor of the husband and one in favor of his wife, were joined in the same petition for foreclosure,

held, that the objection of misjoinder not being taken by plea, answer or demurrer, must be considered as waived. *Bartlett and Wife v. Boyd*, 256.

2. When a mortgage is held and owned by the wife as her *separate property*, the husband cannot properly be joined as a co-plaintiff to foreclose it, but the objection should be taken as demurrer, and if not so taken, it cannot be insisted upon at the hearing. *Ib.*

3. When after bill and answer, the parties agree upon a compromise and reduce the same to writing, it may be regarded by the court as tantamount to an amended answer, and as evidence of the facts embodied in it sufficiently to base a decree thereon. *Horton, Ex. v. Baptist Church*, 309.

4. When one owns and is in possession of land, over his title to which there is a cloud by reason of a claim of title on the part of others, a court of equity has jurisdiction, upon a bill for that purpose, to remove such claim, and to relieve the orator's title from the cloud. *Eldridge v. Smith et al.*, 484.

See COSTS 1, 2; INTERPLEADER 1, 2; MARSHALLING 1, 2, 3; MORTGAGEE.

COLLATERAL SECURITY.

A creditor, holding collateral securities for his debt, need not surrender such securities to the debtor in order to enforce his debt directly against him. The creditor is entitled to hold them until he gets his pay, and then the securities belong to the debtor. *Bk. of Rutland v. Woodruff et al.*, 89.

CONDITIONAL SALE, *See* TRESPASS 2.

CONFESSIONS.

1. Confessions by a person charged with a crime made under promises or threats, inducing hope or fear, are not admissible in evidence against such persons when on trial for the crime. *State v. Walker*, 296.

2. Where the owner of a factory, which the respondent was charged with burning, visited the respondent at his request in jail, and in course of the conversation told him he wanted he should tell the truth just as it was; that it would be better for him; that they had got Brierly, (another person charged with the same crime,) and probably they would both be tried that day; that it would be better to tell the truth just as it was; and thereupon the respondent confessed the crime; *Held*, that the confession was made under such inducements of hope and fear as would exclude it on trial of the respondent for the offence. *Ib.*

CONSIDERATION.

An agreement to enlarge the time stipulated for the performance of a contract requires no new extraneous consideration to support it; the plaintiff's promise to accept performance within the enlarged time being a sufficient consideration to support the defendant's promise to perform within such enlarged time. *Hill v. Smith & Carpenter*, 535.

See BILL OF EXCHANGE 5, 9; CONTRACT 4; PROMISSORY NOTE 1, 2.

CONSTABLE, *See* EXECUTION 5; OFFICER.

CONSTRUCTION, *See* DEED.

CONTRACT.

1. Whatever is expected by one party to a contract, and known to be so expected by the other, is to be deemed a part or condition of the contract. *Jordon and Wife v. Dyer*, 104.

2. The defendant executed to the plaintiff a written contract, wherein, after reciting that the plaintiff had let the defendant take two oxen to work and use well, and run all risk to them of accident, sickness and death, for one year, and that the plaintiff had received of the defendant an obligation against one B., for the sum of \$82.66, to be applied on the contract when paid, it was provided in substance that if the defendant had a mind to pay the plaintiff \$115, and interest, in one year, he might own the oxen, but if they were returned he was to pay \$12 for the use of them; and that if the defendant paid the plaintiff or bearer \$82.66, and interest, the plaintiff should give up to the defendant the obligation of that amount above mentioned. It appeared that under this contract the defendant kept the oxen until a short time before the close of the specified year, when he told the plaintiff he was not going to return them, and kept and used them until one of them died, shortly after the close of the year; and that the defendant had not paid anything for the oxen or for the use of them; *Held*, that the contract showed that the parties really contemplated a sale of the oxen, but took pains to keep the title to them in the plaintiff to secure him until they were paid for; that the facts proven showed an election on the defendant's part to become the purchaser of the oxen under the contract; that the fact of the plaintiff's bringing suit for the price of the oxen showed an election on his part to treat the defendant as their owner; and that the plaintiff was entitled to recover their price under the common counts in assumpsit. *Fuller v. Bursell*, 107.

3. *Held*, also, that the fair meaning of the contract was, that if the oxen died in the defendant's hands, so that he could not return them, he was to be liable for their price, as upon an absolute purchase. *Ib.*

4. The plaintiff was the owner and holder of a note payable to A. or bearer, and had a suit pending thereon against the defendant. The defendant had a note against A. at the same time. The plaintiff promised the defendant, if he would give a new note to the plaintiff for the one then in suit, he would show the defendant property, belonging to A., sufficient to secure the note the defendant held against A. Thereupon the defendant gave the plaintiff a new note for the one then in suit. This action was upon the new note. *Held*, the failure of the plaintiff to show the defendant property whereupon to secure his note against A., was no defence to this suit, as the promises, though mutual, were independent, and each party could have an action on such promise without proving performance on his part. *Plumb v. Niles*, 230.

5. The plaintiff promised the selectmen of the town of D. that if they would discontinue an old road passing through his land and lay a certain other new road to take its place, he would subscribe one hundred dollars towards it, and thereupon the selectmen laid the new road and contracted with

K. to build it, and among other things promised he should have therefor the one hundred dollars subscription by the plaintiff; *held*, that as between the town and K., the town were under obligations to discontinue the old road in order to make the one hundred dollars available to K. *Morrill v. Derby*, 440.

6. And where, after the new road had been finished and accepted, but before the old one had been discontinued, the selectmen directed the plaintiff to pay the one hundred dollars subscription to K., saying that the old road should be discontinued, and thereupon the plaintiff gave K. his note for that amount; *held*, that if the town neglected and refused to discontinue the old road, the plaintiff might recover of the town for the one hundred dollars, as so much money paid to their use. *Ib.*

7. Nor would it make any difference that there was an understanding between the plaintiff and K. that K. should not call upon the plaintiff for the note unless the old road was discontinued. *Ib.*

See CONSIDERATION; CORPORATION 1; EVIDENCE 10, 18, 19; ILLEGAL CONTRACT; PRINCIPAL AND AGENT 1; SALE 1, 2, 8, 4, 5.

CORPORATION.

1. If a contract between two corporations is not in violation of some public law or contrary to public policy, it seems that only the immediate parties to it, as the corporations themselves, or the stockholders, who are parties by representation, hold such a legal position in relation to the contract, as to entitle them to raise the question of its validity on account of the alleged want of capacity of the parties to make it. *Vt. & Can. R. R. Co. v. Vt. Cen. R. R. Co. et als.*, 2.

2. The assuming of a debt against a third person is not within the ordinary powers of the treasurer of a corporation. It is not in the usual course of business, and some special authority so to do must be shown. *Stark Bank v. U. S. Pottery Co.*, 144.

3. The facts disclosed in this case do not show any special authority. *Ib.*

4. The directors of a corporation have not power to assume such a debt except in case of urgent necessity, which is a question of fact for the jury. *Ib.*

5. Although such urgent necessity exists, still when there were only seven directors, and it appeared that three of those, who were relied upon to make a majority assenting to assuming the debt, were liable on the debt assumed, *held*, it must further appear that they acted in perfect good faith to the corporation, and that this was a question for the jury. *Ib.*

6. When it appeared that the debtor transferred a large amount of stock to the defendants a few days after the debt was assumed as security for his indebtedness to them, but it also appeared he owed them a large sum besides the debt; *held*, that the receipt of this stock could not be treated as a ratification of the act of assuming the debt, in the absence of proof that it was received as security for this particular debt, and that this was known to the directors. *Ib.*

7. When a church and society are an existing organized association acting in a collective *quasi corporate* character, an agreement of compromise of a suit by a majority of the members is binding upon the minority. *Horton, Ex'r, v. Baptist Church*, 309.

See DEED 1, 3, 4.

COSTS.

1. Ordinarily the supreme court will not disturb the decree of the chancellor in respect to costs. *Sanders v. Wilson et al.*, 318.

2. Under the circumstances of this case *held* the decree of the chancellor, denying the orator costs, was equitable and just. *Ib.*

COVENANT.

1. To sustain an action for breach of a covenant for quiet enjoyment, it is necessary for the plaintiff to prove that he was evicted by a person who had a lawful and paramount title existing before or at the time of the defendant's covenant, as the covenant for quiet enjoyment applies only to the acts of those claiming title and to rights existing at the time it is entered into. *Knapp v. Marlboro*, 235.

2. The plaintiff and his grantors had been in possession of the premises in controversy more than half a century, and he was then evicted by a third person; *held*, in an action against his covenantor, that such long continued possession raised a conclusive presumption that he was not evicted by title paramount: *Ib.*

3. In order to recover for the breach of a covenant of warranty in a deed of land, the plaintiff, if he relies on an eviction, must show one by a lawful title in the person evicting, existing before or at the time of the grant. *Swa-zev v. Brooks*, 451.⁶

See JUDGMENT 1; TAXES 1, 2, 3.

CRIMINAL LAW See CONFESSIONS 1, 2; FORGERY 1, 2, 3.

DAMAGES.

1. In a suit for work or labor done, or goods sold and delivered, the defendants, under the general issue, may reduce the damages by showing the work unskilfully done, or the goods not as good as warranted; but it seems that a defendant cannot, under the general issue to reduce damages, show a breach by the plaintiff, of stipulations independent of those on which the plaintiff claims to recover, even though they are included in the same contract on which the suit is brought. *Keyes v. Western Vt. Slate Co.*, 81.

2. When by the provisions of a contract, the defendants were bound to repair a drain on premises leased to the plaintiff, and the plaintiff notified them it was out of repair, *Held*, if they neglected to repair it, the plaintiff should do so, and the measure of damages for so doing would be the cost of repairs; but when the defendants, after notice to repair, promised from time to time

they would repair, but neglected so to do; *held*, the plaintiff was entitled to recover the actual damages sustained by him by such neglect. *Ib.*

3. The defendant, a common carrier, contracted with the plaintiff to transport certain articles to a certain place by a certain time, being informed by the plaintiff at the time that he desired to have the articles there at the time named, because that was the market day for such property, and the most favorable time to sell it. The defendant having failed to fulfill his contract, it was *held* that the plaintiff was entitled to recover as damages the difference between what he was obliged to sell the property at when it did arrive in market, and what he would have received at the time at which it would have arrived, if the defendant had performed his contract. *King v. Woodbridge*, 565.

See ADDITIONAL COUNTS 6.

DECLARATION.

See ADDITIONAL COUNTS.

DECLARATIONS, *See* EVIDENCE 6, 7.

DEED.

1. A deed to a corporation aggregate will convey a fee, though the word "successors" is not used. *Cong. Society v. Stark et al.*, 243.

2. When the *habendum* clause in a deed is contradictory to the premises, it is void, but when it simply explains, limits or qualifies the premises, it performs its proper office. *Ib.*

3. A deed in the description of the premises simply described the land by its boundaries. The *habendum* was "during the time the said society or their heirs shall meet on said land for public worship or have a meeting house standing on said land, and appropriate the use of the same to Congregational or Presbyterian public worship;" *held*, that when the grantees or their successors ceased to use the land for the purposes specified, it reverted to the grantor and his heirs. *Ib.*

4. When it appeared that the original society, as such, had removed to another place, and ceased to meet on the land for public worship, but a minority of its members continued to meet there under a new organization and name, *held*, that this removal operated as a forfeiture of the rights of the society under the first clause of the *habendum*, but that under the second clause of the *habendum* neither the original society nor one claiming under them, or by authority from them, would forfeit their right to the land so long as they or either of them should continue to keep a meeting-house on said land and appropriate the use of the same to Congregational or Presbyterian public worship. *Ib.*

5. A forfeiture of the land under such circumstances would not work a forfeiture of a stove put into the meeting-house by the society. *Ib.*

6. Where land is bounded "upon," "on" or "along" a highway, the presumption is that the line extends to the middle of the highway. *Marsh v. Burt*, 299.

7. A piece of land was described as follows: "Beginning on the west side of the road at the end of a wall, running westerly on said wall, and in a straight line therewith to the west line of lot No. 3, thence on said west line to the centre line of said lot No. 3, thence on said centre line to the road, thence on said road to the place of beginning." *Held*, that the west line of the land extended to the middle of the highway. *Id.*

8. Another piece was described as follows: "On the south side of the road opposite to the last mentioned piece fenced on two sides, being a ridge of land lying between said road and the centre line of lot No. 3, to extend so far east as to make just five acres." *Held*, that the line extended to the middle of the highway. *Id.*

9. Another piece was described as follows: "Opposite to the last mentioned piece on the east side of said road within the fences or wall." *Held*, that inasmuch as it in fact was bounded on the highway, though not so described taken in connection with the fact that the three pieces were all conveyed together, it must be deemed to have been the intention of the grantor to convey to the middle of the highway. *Id.*

10. If the language of a deed describing land conveyed, bounded upon a highway, leaves it doubtful whether the grantor intended the line to be in the centre or on the side of the highway, the boundary will be construed to be the centre of the road. *Id.*

11. Where a deed conveyed a tract of land "except eight acres on the south-west corner of said tract, being the land where Jonas Coolidge now lives," and it appeared that the eight acres as occupied by Coolidge had definite limits and boundaries, at the time of the execution of the deed, which was known to the grantee, but the occupancy did not extend up to, and was not upon the true west line of the tract; *Held*, that without the words "being the land where Joseph Coolidge now lives," the exception would be construed to mean eight acres in the south-west corner on the south and west lines of the tract, but that with those words, it would be construed to mean eight acres as then occupied and possessed by Jonas Coolidge. *Sawyer v. Coolidge*, 303.

12. The word *appurtenances* in the *habendum* of a deed, when none are specified, will not be construed to convey anything except what was legally appurtenant to the land in the hands of the grantor; and, therefore, will not be extended so as to convey an easement in the land of another, which, by reason of not having ripened into a legal right, had not become legally attached to the premises conveyed, unless accompanied by proper words describing it, and showing the intention of the grantor to pass it. *Swasey v. Brooks*, 451.

See EVIDENCE 13, 14; MORTGAGE 2; PRINCIPAL AND AGENT 2.

DELIVERY, *See EVIDENCE 18.*

DEPOSITION.

1. The defendant gave notice to the plaintiff of the time and place of taking a deposition. When the agent of the plaintiff arrived at the place appointed for the taking of the deposition the justice had commenced to write

out the deposition, and on the appearance of the plaintiff's agent, the defendant's agents, the justice and the deponent, all withdrew to another room, and completed the direct examination of the deponent, and would not allow the plaintiff's agent to be present, although he insisted upon his right to be present. It was held that the deposition was improperly admitted, and the subsequent cross-examination of the deponent by the plaintiff's agent was no waiver of the irregularity in taking the previous part of the deposition. *Pratt v. Battles*, 391.

2. The interference of a party in the taking of a deposition by suggesting and dictating answers to the witness, so as to render it doubtful whether the answers taken down were such as the witness would have given if left free to dictate his own answers, is sufficient to exclude a deposition. *Ib.*

3. When the ruling of the county court in admitting a deposition is *pro forma*, it is open to revision by this court. *Ib.*

4. *QUERRE*.—Whether open to revision generally. *Ib.*

DESCRIPTION, *See* RAILROADS 20, 21.

DILIGENCE, *See* BAILMENT 2.

DIRECTOR, *See* BANK DIRECTOR 1, 2; CORPORATION 4, 5, 6.

DISCHARGE.

1. W. having been made an agent to settle a claim which the plaintiff had against divers persons, for a joint assault, settled with two of them, and gave each of them a writing indemnifying them against any claim the plaintiff might have against them, growing out of such assault; *held*, that this was a full discharge as against the plaintiff in favor of these two. *Eastman v. Grant*, 387.

2. *Held*, also, that if it did not appear that this was not a settlement for all the damages sustained by the plaintiff, it would operate as a discharge of all the other persons engaged in the assault. *Ib.*

DOMESTIC ANIMALS, RESTRAINT OF, *See* HIGHWAY.

DRUNKARD, *See* INTOXICATING LIQUOR 4.

DUE DILIGENCE, *See* BAILMENT 2.

EMINENT DOMAIN, *See* RAILROAD 13, 14, 15, 16, 17, 18, 19.

ESTOPPEL.

If one stands by and sees his own property sold by another, or dealt with by another, to or with third persons, he is estopped from setting up his own title against persons purchasing, or giving credit upon it, even though his own conduct results from mere carelessness or negligence, and with no real purpose to defraud. *Cady v. Owen*, 598.

See JUDGMENT 1, 2.

EVIDENCE.

1. The entries of a deceased clerk made upon the books of the master in the usual course of business, are evidence in favor of the master against a third person. *Bacon v. Vaughn*, 73.

2. Nor does it make any difference that neither of the parties have any present recollection as to the subject matter of such entries. *Id.*

3. The weight, that should be given to such evidence, is exclusively a matter for the consideration of the auditor. *Id.*

4. To entitle a party to give secondary evidence of the contents of a written instrument, on the ground that the instrument itself is lost, it must be shown that all the sources of information and means of discovery in the search for it, which the nature of the case would naturally suggest, and which were accessible to the party, had been in good faith reasonably exhausted. *Thrall v. Todd and Trus.*, 97.

5. Therefore, where the trustees of the defendant sought to be discharged from liability to the plaintiff, on the ground that the debt due from them to the defendant had been by the latter, before the service of the trustee process, assigned to a third party, who had notified them of such assignment by delivering to their agent and treasurer the written order or assignment directing payment to such third party; and the agent and treasurer in his disclosure testified that he had not the written order with him and did not know where it was; that he might have it among his papers and might have given it to the attorneys of the trustees; which was all the evidence presented as to its loss; *held*, that this was not sufficient to let in secondary evidence of its contents, as it did not indicate any search for the order among the papers of the treasurer, or inquiry for it of the attorneys of the trustees. *Id.*

6. The plaintiff and defendant each claimed to be the owner of certain cattle. The plaintiff claimed that W. bought them for him, as his agent, and with his money. The defendant insisted that W. bought the cattle for himself, with his own money, and sold them to the defendant. The plaintiff introduced evidence to show that he employed W. and another agent to drive the cattle to a pasture, hired jointly by himself and W., and that he directed them to call, as they went along, upon the owner of the pasture, and there brand the cattle with the initials of the latter's name; and that they did as he directed them; the cattle thus branded comprising the ones in controversy, and also a larger number belonging to the plaintiff, and not in dispute. The defendant claimed that the cattle were thus branded merely to show, if any of them strayed away, that they belonged to that pasture; and offered evidence to prove that while W. and the plaintiff's agent were branding the cattle, W. pointed out the cattle in suit and said that they belonged to him, and that the others belonged to the plaintiff; *held*, that the plaintiff's evidence as to the branding of the cattle having been admitted, the evidence offered by the defendant of W.'s declaration, made at the time of the branding, was admissible as part of the *res gesta*, to rebut the inference that the cattle were recognized as the pro-

perty of the plaintiff by the act of branding them according to his directions, and as the cattle admitted to be his were then marked. *Eddy v. Davis*, 209.

7. *Held*, also, that if the court had instructed the jury that they should reject from consideration the whole transaction of driving the cattle to the pasture and branding them, as not tending to prove ownership either in the plaintiff or W., then the defendant could not have complained of the exclusion of the declaration made by W., at the time of the branding. *Ib.*

8. The defendant executed a promissory note in consideration of the payee's agreeing, by a written contract made contemporaneously with the note and as part of the same transaction, to give up to the defendant his contracts for furnishing cloth boards to certain manufacturing companies, "for the term of two years;" but the contracts to be given up were not definitely described in the written agreement. The defendant's evidence, introduced in defence to a suit upon the note tended to show that the payee had at the time, in fact, no contracts with the companies which he could give up, and that the note was therefore without consideration, and fraudulently procured. The plaintiff offered to show, by *parol*, that he had contracted with the companies to furnish them a certain amount of cloth boards,—to one company "within a reasonable time" and to the other at a specified time which had elapsed when the note was given; that although he had not performed the contracts in time, yet that the companies were still willing, at the time the note was given him by the defendant, to receive the boards of him; and further offered to prove various facts to show that the defendant must have known the situation of these contracts when he gave the note, and to show that the parties in their written agreement, executed with the note, referred to these contracts as the ones to be given up by the payee; *Held*, that this evidence was admissible to identify the contracts referred to in the written agreement executed contemporaneously with the note. *Bradley v. Pike*, 215.

9. *Held*, also, that the plaintiff's evidence, tending as it did to show that the companies were still willing to receive the cloth boards at the time of the agreement between the defendant and payee of the note, did not show contracts so past and abandoned to prevent the proper use of the word "contracts" in describing them; that they still existed in a sense which might prove advantageous to the defendant, and so that he might naturally refer to them by that term, even though it might be doubtful whether he could legally enforce them. *Ib.*

10. The phrase "for the term of two years" in the written agreement of the payee to the defendant, *held*, not a description of the contracts to be given up, but as indicating the period during which the payee of the note was to retire in the defendant's favor from the business of furnishing cloth boards to the companies. *Ib.*

11. The certificate of a town clerk on a deed, of the time when it was received into his office, pursuant to the statute, (Comp. Stat., pp. 117, 118,) is only *prima facie* evidence of the facts recited in the certificate, and may be contradicted by *parol* proof. *Bartlett & Wife v. Boyd*, 256.

12. When the testimony is conflicting as to the price agreed upon in the sale of personal property, it is competent to show the value of the property,

at the time of sale, as tending to show what the real contract was. *Kidder v. Smith*, 294.

13. It may be regarded as the settled law and practice in this state in making title to real estate, that a party may prove the various links in his chain of title, by certified copies of deeds from the records of deeds in the town clerk's office. *Pratt v. Battles*, 391.

14. Where the defendant offered in evidence a copy of a deed, purporting to be dated the 24th day of March, 1807, which was the day of the date of a defective deed which plaintiff had introduced, which was between the same parties, and substantially identical, in terms at least, with the defective deed, but which was not recorded until 1836, and the plaintiff claimed it was a forgery; held, that the copy of the deed was properly admitted, and that the question as to the genuineness of the original was one for the jury. *Ib.*

15. The law which permits a party to show on the trial of a case that the other party has used means to induce witnesses on the other side to absent themselves from court, does not apply to a party to the suit, unless he is a mere nominal party; and the fact that an agent of the party had acquired a lien on the judgment would not change the rule. *Ib.*

16. A transaction cannot be considered as ended so long as the parties thereto remain together, and anything according to the usual course of business remains to be done in regard to it, and until thus ended, whatever may be said by the parties concerning it, will be considered a part of the *res gesta*, and admissible in evidence. *Fifield v. Richardsons*, 410.

17. The defendant conveyed certain land to the plaintiffs in July, after which, as her evidence tended to prove, she remained in the sole possession thereof till October, during which time she cultivated the land and harvested the crops. Her evidence further tended to prove that the plaintiffs lived in the neighborhood and admitted her right to remain in possession and take the crops. In October the plaintiffs sued the defendant in trespass *qu. cl.* and for taking away the crops. Held, that in addition to, and connection with, the foregoing evidence, it was competent for the defendant to prove that previous to, and at the time of the execution of her deed to the plaintiffs, it was verbally understood and agreed by them that she should remain in possession during the remainder of the season and have the crops. *Merrill et al. v. Blodgett*, 480.

18. The delivery of a written contract is indispensable to its binding effect, and is not conclusively proved by showing the delivery of the paper, constituting the alleged contract, by the alleged contracting party to the other. The latter may show by parol that the paper was not delivered to, or accepted by, him as a contract, but as something else; in this particular case, merely as a receipt for certain articles to be transported by the defendant for the plaintiff by railroad. *King v. Woodbridge*, 565.

19. Held, that the acceptance by the plaintiff from the defendant of this receipt, without reading it and supposing it to be merely a receipt, though it contained stipulations so indorsed upon it as to become a part of it, if treated as a contract, to the effect that the defendant did not guarantee any special

dispatch in the transportation of any article, unless it were expressly so stipulated in writing, did not, under the circumstances of its reception, conclude the plaintiff from showing by parol that the defendant did guarantee the delivery of the articles at their point of destination with special dispatch and at a particular time. *Ib.*

20. It is competent for a witness to testify in regard to the general course of business in a particular trade, his knowledge of which is derived from experience therein, though partly obtained from information from others in the course of such business. *Ib.*

21. Evidence that the defendant offered to settle the plaintiff's claim if the latter would consent to a continuance of the cause for a certain period, is admissible as tending to establish his liability. *Clapp v. Foster*, 580.

22. A witness may state what a third person said, for the purpose of identifying a particular occasion or date. *Hill v. North*, 604.

23. The acts of a witness and also his silence, where good faith requires a disclosure of his knowledge, when such acts and such knowledge are inconsistent with his testimony, may be given in evidence for the purpose of affecting his credibility. *Cady v. Owen*, 598.

See BILL OF EXCHANGE 7, 10; CONFESSIONS 1, 2; PARENT AND CHILD 1, 2, 3; REFERENCE 7; SLANDER; USURY; WITNESS 1, 2.

EXECUTION.

1. An execution issued for sixty days when it should have been issued for one hundred and twenty days, is void; and the return of the officer upon it that the judgment has been satisfied is void also; and the judgment, notwithstanding all that may be done under such an execution, will stand in full force, precisely as it did before the execution was issued. *Fifield v. Richards*, 410.

2. The case of *Bond v. Wilder*, 16 Vt. 393, approved. *Ib.*

3. *Audita Querela* is an appropriate remedy to vacate and set aside the levy of an execution on real estate, when, through the fraud of the creditor, the officer has made a false return of the appraisal, and has consequently set off too much of the debtor's property, on the basis of the actual appraisal, to satisfy the execution or the amount which he returns as satisfied, when this irregularity does not appear upon the face of the officer's return. *Hopkins v. Hayward*, 474.

4. Such a defect in a levy is not cured by the omission of both parties to bring a petition to the Supreme Court to vacate the levy, in accordance with sec. 49, chap. 46, p. 316 of the Compiled Statutes. *Ib.*

5. Where a constable, who had attached property upon mesne process, had removed from the State, it was held a sufficient demand of property attached to charge it upon the execution, to demand it of the selectmen and town agent of the town, and of one of the persons whose accountable receipt the constable had taken for the property. *Austin v. Burlington*, 506.

See OFFICER 4, 5, 6, 7, 8; RECEIPTOR 1, 2, 3.

FALSE IMPRISONMENT.

1. Every citizen is bound to assist a known officer in making an arrest when called upon so to do, nor is he bound to inquire into the regularity or legality of the process in the hands of the officer. *McMahan v. Green*, 69.

2. A known officer had in his hands a warrant against John McManus. He arrested upon the warrant the plaintiff, John McMahan, and the defendant, at the request of the officer, assisted in making the arrest; *Held*, that although the arrest was illegal, the request of the officer was a full justification to the defendant, and he was not liable for false imprisonment in assisting in making the arrest. *Ib.*

FALSE REPRESENTATIONS, See FRAUDULENT REPRESENTATIONS.

FENCE, See HIGHWAY 2.

FIXTURES.

1. As between a mortgagee and a vendee of the mortgagor with notice, *held*, that a steam engine, boiler, the arch mouth in front of the boiler and the iron plate under the boiler, which furnished the motive power for a machine shop, together with the shafts and pulleys connected with the engine, were fixtures. *Harris v. Haynes*, 220.

2. A mortgagee after condition broken is entitled to possession of the premises, and may maintain trespass *qua. clau.* for an injury thereto. *Ib.*

3. On the facts reported by the referee, *held* that it did not sufficiently appear that the breach of the condition was before the alleged trespass and thereupon the report was recommitted. *Ib.*

4. At a subsequent time the referee having reported that the breach of the condition was prior to the alleged trespass, the court gave judgment for the plaintiff for the value of the engine, arch mouth, and iron plate and the shafting and pulleys. *Ib.*

FOREIGN LAW, See INTOXICATING LIQUOR 1, 2; USURY.

FORFEITURE, See DEED 4, 5; RAILROAD 4.

FORGERY.

1. It is an indispensable element in the crime of forgery, that the forged paper must be such, that if genuine, it may injure another, and it must appear from the indictment that it is legally of such a character, either from a recital or description of the instrument itself, or, if that alone does not show it to be so, then by the additional averment of such extrinsic facts as render it of that character. *State v. Briggs*, 501.

2. In the statute prohibiting the forgery of any "bond or writing obligatory," (General Statutes, Chap. 114, Sec. 1, p. 678) these words are used in their legal sense, as meaning bonds binding some obligor to some obligee, and

requiring something to be done, which, if not done, can be compensated by an action on the bond. *Ib.*

3. Therefore, an indictment for forgery is not sufficient, which describes the forged instrument only as "a certain writing, purporting to be a bond, with condition thereto annexed, signed, sealed, and executed by A., B., and C., and dated January 8th, 1853, with intent to injure and defraud the said A., B., and C.," notwithstanding it also contains an averment that the bond cannot be more particularly described, because it is in the possession of the respondent. *Ib.*

FRANCHISE, *See* RAILROAD 12.

FRAUD, *See* FRAUDULENT REPRESENTATIONS.

FRAUDS, STATUTE OF.

1. Where a contract, not reduced to writing, is taken out of the operation of the statute of Frauds by the payment of earnest money, it does not contravene the spirit or policy of the statute to allow its terms to be varied by parol in respect to the time of its performance. *Packer v. Steward*, 127.

2. A memorandum in writing, as required by the Statute of Frauds is necessary only when it appears by the whole tenor of the agreement that it is *not* to be performed within a year. *Blanchard v. Weeks*, 589.

3. A contract by W. "to refrain from the practice of medicine and surgery at McIndoe's Falls, while B. should reside and practice medicine and surgery at that place, and forever," *may* be performed within a year, and therefore need not be in writing. *Ib.*

FRAUDULENT REPRESENTATIONS.

1. An action on the case will lie for false and fraudulent representations made by a vendor of land, in regard to the quantity of the same. *Harlow v. Green*, 379.

2. When a person had purchased land, relying upon the fraudulent representations of the vendor as to the quantity, and had paid for the same, but had not taken a deed, *held*, he might nevertheless maintain an action for such fraudulent representations. *Ib.*

3. The form of declaration for false warranty of personal property used in this state, is adapted to a declaration on the case for false representations in the sale of real estate. *Ib.*

4. Where the defendant, in reply to an inquiry made by the plaintiff, in making the purchase of a horse, whether the animal was sound, said that he was so far as he knew, and the court upon all the evidence, failed to find that the defendant *really believed* the horse was unsound, but did find that "he had reasonable and good ground to suppose that he was, and that he knew if he communicated what he had discovered, and what had been told him in relation to the horse, it would be likely to prevent the plaintiff or any purchaser from buying the horse, or materially lessen the price he could obtain for him, and lessen his value in the estimation of the plaintiff or any purchaser," it

was held that this amounted to an affirmative misrepresentation, rather than a wrongful concealment of facts, which were material, and ought, in good faith, to have been disclosed. *Wheeler v. Wheelock*, 553.

See ILLEGAL CONTRACT 3.

GENERAL ISSUE, See DAMAGES 1.

GRAND LIST.

On the question whether the selectmen, under the provisions of the Act of 1855, No. 43. secs. 26, 27, are authorized to raise an assessment, on appeal, above the sum established by the listers; held, that the word "appeal," as used in both of the sections, denotes an application for relief, and that therefore the power of either board is limited to the granting of relief by reducing the assessment complained of, or to the denial of any relief. *Leach v. Blakely*, 134.

See LISTERS.

HABITUAL DRUNKARD, See INTOXICATING LIQUOR 3, 4.

HIGHWAY.

1. The owner of lands through which a highway is established, retains the fee of the soil embraced within its limits, with the full right to its enjoyment in any manner not inconsistent with the enjoyment of the easement by the public for the purposes of a highway; and this right is exclusive against all other persons. *Holden v. Shattuck*, 336.

2. Under the recent statutes in this State, the law is, as it ever has been in England, that the owner is under no obligation to fence his land along the highway; the obligation in this respect being limited to his duty to restrain his cattle from trespassing upon his neighbors. *Id.*

3. Therefore, the mere fact of a domestic animal being in the highway, unattended by its owner or servant, cannot be regarded as unlawful, or a breach of duty, rendering the owner liable for injurious consequences that may accidentally flow therefrom. *Id.*

4. In order to constitute the presence of such animal in the highway adjoining the owner's land, wrongful on the part of the owner, it should appear that the circumstances and occasion, or that the character and habits of the animal, were known to the owner to such an extent as to warrant the finding of the fact of carelessness on the part of such owner, in reference to the convenience and safety of the traveling public. *Id.*

See HIGHWAY SURVEYOR 1, 2; DEED 6, 7, 8, 9, 10.

HIGHWAY SURVEYOR.

1. If the selectmen of a town describe, in the tax bill given by them to a highway surveyor, as within his district, a highway, which, though never legally established as a highway, has been recognized and repaired as such by the town, and used by the public, and the surveyor proceed to repair such

highway, and, in consequence of its never having been legally established, is obliged to pay damages in trespass to a land owner for working the same, he is entitled to be indemnified by the town for such damages. *Ladd v. Waterbury*, 426.

2. A highway surveyor is not obliged to look beyond his tax bill and warrant to ascertain the extent of his district and the roads which he is to repair. *Id.*

HUSBAND AND WIFE, *See* WITNESS 1, 2.

ILLEGAL CONTRACT.

1. A contract for the performance of services as a lobby agent or for the exertion of one's personal influence and solicitations, to procure the passage of a public or private act of the legislature is void, as being prejudicial to sound legislation and against public policy, and there can be no recovery for such services either on the special contract or a *quantum meruit*. *Powers v. Skinner*, 274.

2. The defendant promised to pay the plaintiff a certain sum in consideration of his engagement to labor faithfully before the legislature for the charter of a bank; and the auditor found that the plaintiff under this contract was expected to and did solicit members of the legislature in behalf of such project, as he had opportunity. *Held*, that this was equivalent to an express finding that the contract contemplated the exercise by the plaintiff of his personal solicitation with members of the legislature in support of the application for the charter, and that the contract was therefore void. *Id.*

3. The rule will apply to a case of fraud, as to a case of duress, that where one has, by fraudulent means, induced another to pay him money, he cannot shield himself from paying it back on the ground that both parties had an illegal end in view in the transaction. *Hinsdill v. White*, 558.

See INTOXICATING LIQUOR 1, 2.

INCUMBRANCE, *See* TAXES 1, 2.

INDICTMENT, *See* FORGERY 3.

INTEREST.

If a contract is silent on the subject of interest, and does not by implication exclude it, on money due and payable under the contract, the law implies that interest is to be paid from the time the debt becomes payable. *VI. § Can. R. R. Co. v. VI. Cent. R. R. Co. et al.*, 2.

INTERPLEADER.

1. The parties defendants in a bill of interpleader stand before the court to litigate the questions of right pending between them, to the same extent as if one had brought a bill against the other predicted upon the same matter and for the same purpose. *Horton, Ex'r, v. Baptist Church*, 309.

2. When one of the defendants in a bill of interpleader was a church and society claiming property under a devise in a will, and the other defendants were heirs at law of the testator contesting the validity of the devise, *held* that they

being the real parties in interest, it was competent for them, without regard to the orator to make such an adjustment of the controversy as they might think best, and so end the suit. *Id.*

INTOXICATING LIQUOR.

1. Where a manufacturer of liquor in Massachusetts was duly authorized to sell under the restrictions of the statute of 1855, concerning the manufacture and sale of spirituous or intoxicating liquor, among which restrictions was one that he should keep a tabular statement of all sales, containing the date, name of purchaser, &c., *held*, that although no tabular statement, according to the form prescribed by the statute, was kept by such manufacturer, still if his books, kept in the usual course of business, contained the same entries required in the tabular statement, it was such a substantial compliance with the law that a sale would be valid. *Barnard & Co. v. Houghton's Est.* 264.

2. Where the form of the tabular statement given in the statute contained one entry, "purpose of sale," but the tenth section of the law providing for the sale by manufacturers did not contain a provision requiring such an entry, *held*, that the form given in the statute could not be considered as adding a new requirement to the statute. *Id.*

3. When a witness testified that H. used liquor to excess at some particular times, and that he had seen him the worse for liquor some number of times, and another witness said H. was a dissipated man; *held*, that this evidence has a legal tendency to show that H. was an habitual drunkard, in the sense in which these words are used in section 1, page 19, Acts of 1853. But its sufficiency, in amount, is wholly a question for the jury. *State v. Pratt*, 323.

4. An habitual drunkard is one who is in the habit of getting drunk, or one who commonly or frequently is drunk; not that he is constantly or universally drunk. *Id.*

5. Evidence that for a considerable period of time a very large number of persons had been in the habit of going to the defendant's house, many more than went to the houses of other persons in the same neighborhood, and many more than any business in which he was openly and honestly engaged furnished any occasion for, that many of these persons came from other towns, called at unusual hours, and under suspicious circumstances, is competent to be left to the jury to prove that the defendant's house had become a place of public resort; and if the defendant would avoid the effect of the presumption raised by such evidence, he must show some other reason for it, that being peculiarly within his knowledge. *Id.*

JAIL KEEPER, *See* OFFICER 2.

JOINDER OF PARTIES, *See* PARTNERSHIP 2, 4.

JUDGMENT.

1. When a covenantor is vouched in to defend an action of ejectment by a third person against his covenantee, the judgment in the action of ejectment

is conclusive as to all matters therein adjudicated, in a subsequent action between the covenantor and covenantee. *Knapp v. Marlboro*, 235.

2. A verdict and judgment is conclusive evidence, between the same parties in a subsequent suit, of whatever it was necessary for the jury to have found in order to warrant the verdict in the former action, and no further. *Town v. Lamphere*, 365.

See EXECUTION 1.

JURISDICTION.

1. Where one had an account for articles sold to another, who, soon after the purchase, became associated in partnership with a third person, and the creditor severed his account, and brought two suits before a justice of the peace, one against the purchaser of the articles alone, and the other against the latter and his new co-partner jointly, the severance of the account, which was altogether more than one hundred dollars, bringing the amount claimed in each suit within the jurisdiction of the justice; *held*, that as the plaintiff appeared, from the facts proved, to have brought the suit against the firm in good faith and upon reasonable grounds of belief that he could sustain the action against the co-partner of the purchaser for that portion of his account embraced in such action, the plaintiff was justified in severing that portion of the account from the other, although, as it resulted, the purchaser's partner was not in fact liable to the plaintiff, who obtained judgment only against the purchaser; and that the justice, therefore, had jurisdiction of both cases. *Reed v. Stockwell et al.*, 206.

2. When payment is made on book and credited on the account, the debit side of the book will remain unchanged, and the jurisdiction of the case be unaffected; otherwise, if, by the agreement of the parties, the balance due be transferred to a new account. *Willard v. Collamer*, 594.

See REFERENCE 8, 9.

JUSTICE OF THE PEACE, *See* JURISDICTION 1; OATH OF OFFICE 1, 2, 3; REFERENCE 8, 9.

LEVY OF EXECUTION, *See* EXECUTION 1, 2, 3, 4.

LICENSE.

The owner of premises consisting of a saw mill, grist mill, water privilege and lands adjacent, conveyed to A. in fee an undivided half thereof. The deed, after the description of the premises, contained the following words: "with the right to said A. to put in a mechanics' shop and planing mill between the saw mill and grist mill, and also to take water from the flume for the same, so as not to injure or interfere with the use of the water for the said mills or either of them, or such machinery as may be substituted for them." *Held*, that by this deed A. took, in addition to his undivided half interest in the whole premises, only a *license* to erect such buildings and occupy them, and use water for them, as above named, and that such license expired with the decay of the buildings. *Baldwin v. Aldrich*, 526.

See EVIDENCE 17; PARTITION 5, 6.

LIEN.

1. The manufacturer of starch is entitled to a lien on the same for the price of manufacturing, notwithstanding it was manufactured under a special agreement providing for the payment of such price in advance. *Ruggles v. Walker*, 468.

2. But this lien is purely a personal privilege and cannot be sold or transferred. It amounts only to a right of detaining the property until the price of manufacture is paid, and the retention of the possession of the property, or a portion of it, is essential to its continuance. *Ib.*

See RAILROAD 6.

LISTERS.

1. While in relation to most of the duties of listers, they involve so much of matter of judgment and discretion, and partake so much of the nature and character of judicial proceedings, that their judgment, exercised in good faith, and without malice, is conclusive in their favor, yet in relation to setting real estate in the list to the owners or the persons liable to pay taxes thereon, so far as relates to the persons to whom the land is to be set and the number of acres, the listers are bound to act in good faith, and with common care, skill and prudence, and if they so act they are not liable for mistakes or inaccuracies; but if not, they are liable to the party injured for the consequences of such mistakes, oversights or inaccuracies. *Wilson v. Marsh et als.*, 352.

2. The statute requiring the listers to make an appraisal of real estate once in five years, was obviously intended to give a degree of permanency to the list for that period, with such intermediate changes as the changes of ownership or occupancy, or the erection or destruction of buildings may require, and the listers between the years of such appraisal have a right to rely on it as correctly made up, and to make it the basis of a new list, and they cannot be charged with negligence for not discovering and correcting errors arising from events subsequent to the making of such list, unless they are of such an extent and character and so obvious as to be equivalent to notice. *Ib.*

See GRAND LIST.

LOBBYING, See ILLEGAL CONTRACT 1, 2.

LOST INSTRUMENTS. See EVIDENCE 4, 5.

MANUFACTURER'S LIEN. See LIEN 1, 2.

MARRIED WOMAN.

1. A warranty deed by the husband does not estop the wife from enforcing a prior mortgage on the same property held by her as her separate property, against the husband's grantee, and those holding under him. *Bartlett & wife v. Boyd*, 256.

2. The acquiescence of the husband in line fences and boundaries of land will not affect the rights of the wife, when the land is her separate estate. *Sawyer v. Coolidge*, 302.

See CHANCERY 1, 2; WITNESS 1, 2.

MARSHALLING.

1. When premises incumbered by mortgage are sold by the mortgagor in separate parcels to several purchasers, as between the purchasers the several parcels shall be charged with the burden of the mortgage in the inverse order of the time of alienation. *Root v. Collins et als.*, 173.

2. A parole sale of a part of mortgaged premises, followed by possession and improvements on the same by the vendee, is sufficient, as between the vendee and the mortgagor and those claiming under him, having actual notice of the parole sale, to throw the burden of the mortgage upon the part of the premises retained by the mortgagor. *Ib.*

3. And when a purchaser of a part of the premises retained by the mortgagor had no notice of the parole sale of the other part, but he purchased it as agent and held it in trust for another person who did have actual notice at the time of the purchase, *held*, that the notice was sufficient and that the part so purchased subsequent to the parole sale of the other part, should be charged with the whole mortgage. *Ib.*

MORTGAGE.

1. The defendant, with his wife, executed to the plaintiff a deed conveying to him, by its terms, certain real estate, but continued to hold possession of the premises. Upon the back of the deed, and prior to its execution and delivery, was endorsed an agreement, signed by the plaintiff, but not sealed, witnessed or acknowledged, whereby it was agreed in substance, that if the defendant should within five years from the date thereof pay to the plaintiff a certain sum of money therein named, (which was the same substantially as the consideration named in the deed, and was less than the admitted value of the premises,) "together with the use" of the premises conveyed by the deed, then the plaintiff should make and execute to the defendant a good and sufficient deed of the premises in question; *held*, that the deed and agreement endorsed upon it together constituted a mortgage, and that the defendant was therefore entitled to the possession of the premises until the condition of the agreement was broken. *Graham v. Stevens*, 166.

2. No other written evidence of a debt than that furnished by the instrument itself is necessary to sustain a mortgage. *Ib.*

See CHANCERY 1, 2; MARRIED WOMAN 1; MARSHALLING 1, 2, 3.

MORTGAGEE.

When the mortgagee took possession of the mortgaged premises, after breach of the condition of the mortgage, and held the same for a number of years, and the case was referred to a master to ascertain the rents and profits who reported a great loss on the same in proportion to the value and condition of the premises, although he found the mortgagee exercised a most faithful stewardship in the management of the premises, *held*, that although a mortgagee in possession is only bound to account for what he receives or might

receive from the mortgaged premises, by the use of fair, reasonable diligence and prudence, and if the premises are rented, and rents lost by the failure of a tenant without fault of the mortgagee he is not liable to account, still when the mortgagee himself occupies, and especially when the premises are a farm under cultivation, upon which labor and expenditures are to be bestowed to produce annual crops and profits, the mortgagee will be charged with such sum as will be a fair rent for the premises, without regard to what he may in fact have realized as profits from the use of them. *Sanders v. Wilson et al.*, 318.

See FIXTURES 1, 2, 3, 4.

NON-RESIDENT PROPRIETOR. See TAXES 2, 3.

NOTICE. See MARSHALLING 2, 3.

OATH OF OFFICE.

1. A justice of the peace, in an action against himself for an arrest under a warrant issued by him, cannot justify, if he had not, before such arrest, taken the oath of office prescribed by the constitution of the state.—*Courser v. Powers*, 517.

2. Nor will a subsequent administration of the official oath, on the same day of the arrest, enable him to do so, and the true time when such oath was taken may be shown.—*Ib.*

3. Neither will the taking of the official oath under an election to the same office for the previous year enable him to justify. The official oath is only commensurate with the appointment, and covers only the existing term of office.—*Ib.*

OFFICER.

1. An officer is not liable for the penalty imposed by the statute for neglecting or refusing to give a person a copy of the process by virtue of which he is arrested, unless he have process for such arrest in his hands at the time.—*McMahan v. Edgerton*, 77.

2. When an officer arrested a person on a warrant returnable forthwith before a justice of the peace, and the justice was absent at the time, and the officer placed the respondent in jail for safe keeping until the return of the justice, and for no other purpose, and did not leave with the jail keeper any warrant or copy, and thereupon the respondent demanded a copy of the process, on which he was detained, of the jail keeper, who was also sheriff of the county, and tendered the fees therefor, and the jail keeper neglected for more than six hours to give him a copy, it was held the jail keeper did not thereby become liable for the penalty imposed by the statute for neglecting or refusing for more than six hours after demand to give the prisoner a copy of the process by virtue of which he was detained.—*Ib.*

3. When the declaration omitted to aver that the defendant had process or a warrant for detaining the prisoner in his hands at the time of the demand for a copy, and no demurrer was interposed; it was held, nevertheless, that plain-

tiff was bound to show that fact on trial, as constituting an essential element in the offence charged.—*Ib.*

4. A receiptor of property attached, if entrusted therewith without the agency of the creditor, is the agent of the officer making the attachment, and for his torts or neglect in respect to the property the officer is liable.—*Gilbert and wife v. Crandall*, 188.

5. The insolvency of the receiptor, and his consequent inability to respond to a demand on the execution of the property, furnish no defence for the officer in an action by the creditor for not safely keeping the property to respond to the execution. *Ib.*

6. The direction by an attorney of an attaching creditor to the officer holding the writ not to attach real estate, does not relieve the officer from liability for not keeping personal property, attached by him upon the same writ, to respond to the execution. *Austin v. Burlington*, 506.

7. The consent of the attorney of an attaching creditor that the officer may take receiptors for the property attached, given generally, and without naming any receiptors or giving any expression as to the responsibility of those to be taken, and a request to the officer that, before he removes the property attached, he will go to the debtor and see if he will furnish receiptors, do not release the officer from his official liability for the responsibility of the receiptors, in case he allows the property to go into their hands. *Ib.*

8. An attaching officer, who delivers the property attached to receiptors and takes their accountable receipt therefor, is not discharged from liability to have the property to respond to the execution, by the fact that the receiptors, when taken, were actually responsible, but afterwards became insolvent. *Ib.*

See ADDITIONAL COUNTS 1; EXECUTION 5; FALSE IMPRISONMENT 1, 2; RECEIPTOR 2.

OFFSET.

Under our statute, unliquidated damages, growing out of contract, may be pleaded in offset. *Keyes v. Western Vt. Slate Co.*, 81.

OVERSEER OF THE POOR, See TOWN AGENT 1.

PARENT AND CHILD.

1. Where the relation of parent and child exists, and the child, after coming of age, and while in the parent's family, renders services and receives support, the law will not imply from such relation and the rendering of such service that there was a contract, either that the services of the child or the support furnished by the parent should be paid for. There must be proof either of express agreement for pay, or of such facts and circumstances as satisfactorily and fairly show that both parties at the time expected and understood that the services were to be paid for. *Putnam, Admin. v. Town, Ex'r*, 429.

2. But such proof is established by a fair preponderance of the evidence. It is not necessary that the proof in support of the claim for payment for such services should be full, unequivocal and conclusive. *Ib.*

3. The entry, after the rendition of such services, by the parent upon an account book of his opinion that his daughter was not entitled to be paid therefor, on the ground that she had been already fully paid, is not admissible in evidence in favor of his estate against the daughter's claim made after his death. *Ib.*

PARTITION OF REAL ESTATE.

1. If a petition for partition of real estate prays not only for partition, but also, in case the premises are found not divisible, for assignment or sale thereof, in accordance with the statute, a plea that the premises are not partible is not sufficient. *Baldwin v. Aldrich*, 526.

2. When real estate held in common cannot be divided without great inconvenience to the parties interested, the fact that the plaintiff is not hindered in the enjoyment of his share of the rents and profits of the premises, furnishes no ground why the court, upon a proper petition to that effect, should refuse to order an assignment of the whole to one of the parties, or a sale for the benefit of all of them, in accordance with the statute. *Ib.*

3. The dictum of HUTCHINSON, J., in *Brown v. Turner et al.*, 1 Aikens 350, on this point, considered and disapproved. *Ib.*

4. If on trial of a petition for partition it appears that the parties are tenants in common of only a part of the premises described in the petition, the court will proceed to make partition, assignment or sale, as the case may require, of that part. *Ib.*

5. So also, if one of the parties being a tenant in common in fee of the premises with the others, has in addition a license exclusively to use a portion of them for a particular purpose, and so long as certain structures thereon endure, this fact furnishes no reason why partition, assignment or sale, in accordance with the statute of partition should not be made of so much of the premises as are not covered by such licence. *Ib.*

6. But partition will not be made of the reversionary interest in the premises covered by the license. *Ib.*

PARTNERSHIP.

1. When two or more persons agree to become partners, and actually proceed to carry into execution the joint undertaking or business, the relation of partners will exist, although the conditions of the partnership are not understood alike by the partners. *Cook v. Carpenter & Cook*, 121.

2. A dormant partner need not be joined in a suit in favor of the firm against their debtor. *Waite & Co. v. Dodge*, 181.

3. A partner whose name is not known or used in the business of the firm, is a dormant partner. *Ib.*

4. An ostensible though nominal partner, having no interest in the firm, may yet be joined in a suit in favor of such firm. *Ib.*

PARTY. See EVIDENCE 15.

PAUPER.

1. An actual commitment to jail is sufficient to cast the duty of providing for the relief of an imprisoned pauper, who stands in need of such relief, on the jailor and on the overseer of the town where the jail is situated, after proper notice has been given agreeably to the statute, and this duty is in no way dependent upon the regularity of the process on which he is committed. *Newfane v. Dummerston*, 184.

2. A settlement in a town having been established, the legal presumption is, until the contrary is shown, that it continues there. *Ib.*

3. Under the pauper act of 1817, residence is computed only from the time of registry. *Ib.*

4. Under the pauper act of 1823, no residence prior to that time, without registry, can be included to make a future settlement. *Ib.*

5. Where a person leased a farm to carry on at the halves, and the same was put in the list to himself and the lessor jointly, held that such person did not hold the land in his "own right" so as to give him a settlement under the pauper act of 1817. *Ib.*

PAYMENT.

1. The plaintiffs had an account against the defendants, H. & M., as partners, also an unsettled account against H. individually and another against the firm of H. & Bro. C., one of the plaintiffs, settled all these accounts by receiving H.'s individual promissory notes for their amount. At the time of the settlement, M., one of the defendants, objected to the settlement of H. & M.'s account in that way, saying that H. & M. preferred to pay their own debts; but C. replied that he preferred to do so, as he knew H., and was not afraid to trust him. On giving the note, H. charged the firm of H. & M. with the amount of their account included in the note, and the plaintiffs credited the note received, and balanced the accounts so settled. Some time afterwards M. requested the plaintiffs to send him a statement of their account against the then late firm of H. & M., which he received, consisting only of items which had accrued subsequently to the time the note of H. was given. The court, assuming that the case was to be governed by the laws of the State of New York, where the accounts were made, under which the fact of taking the note either of the debtor or of a third person for a pre-existing debt, does not discharge the debt without an express agreement to that effect between the parties, held, that the facts showed such an express agreement of the parties that the note was to be received by the plaintiffs in payment of the defendants' account, as rendered it operative as such payment even under the laws of that state. *Robinson et al. v. Hurlburt et al.*, 115.

2. The language "express agreement," in the cases upon this point, does not mean an agreement in any particular express terms or form of words, but is used to denote the result of a mutual understanding and meeting of the minds of the parties, in contra-distinction to an agreement implied by law. *Ib.*

See ADDITIONAL COUNTS 7; BILL OF EXCHANGE 6; REMITTANCE.

PLEADING. *See* ABATEMENT; ADDITIONAL COUNTS; DAMAGES 1; OFFICER 3.

PLEDGE. *See* RAILROADS 6.

POOR OVERSEER OF. *See* TOWN AGENT.

PRACTICE.

Upon the coming in of the jury disagreed, counsel for the first time requested the court to administer certain instructions; it was *held* that the court would be justified in disregarding the request. The rule of practice requires that any special requests to charge the jury should be presented to the court at the opening of the argument on behalf of the party making the request. *Cady v. Owen*, 598.

See REFERENCE 1, 6; RELATIONSHIP 2.

PRESUMPTION. *See* COVENANT 2; SCHOOL DISTRICT 5, 6.

PRINCIPAL AND AGENT.

1. Where the defendant proposed to sell the plaintiff a quantity of cheese, and told the plaintiff that if he notified him the next day, the plaintiff should have it on the terms proposed, and the next day the plaintiff sent L. to the defendant for the purpose, and no other, of notifying the defendant that he would take the cheese on the terms proposed, and to pay the defendant ten dollars, and thereupon the defendant refused to take the ten dollars unless the plaintiff would take, and pay for, the cheese by the middle of the week following, and L. told the defendant that the plaintiff would take and pay for it by that time, and if he did not the ten dollars would be forfeited; *held*, 1st. That the refusal of the defendant to accept the ten dollars unless the cheese should be taken by the middle of the week following was a repudiation of the proposal of the preceding day, which he had a right to make. 2d. That L. had no authority to bind the plaintiff to take and pay for the cheese the next week following. 3d. That the plaintiff not having affirmed the agreement of L. by offering to take and pay for the cheese by the middle of the week following, the defendant was not liable for refusing to deliver it afterwards. 4th. That the ten dollars, having been paid on conditions which L. had no right to make, might be recovered in this suit. *Sprague v. Train*, 150.

2. A father and son being both named D. F., the father purchased a piece of land, taking the deed to D. F., Jr., describing him as of the town where they both resided, and himself executed notes for part of the purchase money and a mortgage of the land to secure the same, by the name of D. F., Jr., and said nothing of his acting as agent for his son, and the grantor supposed the father was in fact the purchaser, that his name was D. F., Jr., and that he was deeding the land to the father. Some of the evidence tended to prove that the son had authorized the father to buy the place in his, the son's, name, and that he paid either directly or indirectly the whole price thereof. *Held*, that it was a question of fact for the jury to decide whether the son was or was not the real principal and the purchaser of the land, and that if they

found he was, then the title vested in him and not in the father. *Prentiss v. Blake et als.*, 460.

3. When one is not merely a messenger for the principal to receive proposals for a trade, but fully negotiates a trade and pays part of what is to be the price if the principal approves the trade, and the bargain is completed by the principal substantially upon the terms the agent has thus agreed upon, the principal will stand charged with knowledge of whatever was communicated to such agent in the course of the negotiation. *Hill v. North*, 604.

See ACCORD AND SATISFACTION 3, 4; BILL OF EXCHANGE 11, 12.

PROCESS. See OFFICER 1, 2.

PROMISSORY NOTE.

1. A partial failure of consideration cannot be set up as a defence to a note. *Cragin v. Fowler et al.*, 326.

2. Where the thing which was purchased was valueless as it was purchased, and for the purpose for which it was purchased, it is no answer for the vendor, in a suit upon the note given for the purchase money, to say to the vendee, you have, after all, got something that can be made useful in some different manner, or for some other purpose. The purchaser has a right to that for which he bargained, and it must be of some value, or he is not bound to pay for it. *Id.*

See ADDITIONAL COUNTS 1; ASSUMPSIT; PAYMENT 1, 2.

RAILROADS.

1. The contract of lease between the Vermont and Canada Railroad Company, and the Vermont Central Railroad Company, made August 24th, 1849, and the addition thereto made July 9th, 1850, were not *unlawful* in the sense of being in violation of some public law, or contrary to public policy. Those corporations themselves and their stockholders having assented to the validity of those contracts, it is not competent for a bondholder, under the first mortgage of the Vermont Central Railroad Company, which mortgage was given in express recognition of and subjection to those contracts, to object to their validity on account of the want of capacity of those corporations to make them. *Vt. & Can. R. R. Co. v. Vt. Cent. R. R. Co. et al.*, 2.

2. Though the charters of those corporations did not authorize such contracts, the general act of 1847 (Comp. Stat. chap. 26,) did; and it was competent for the corporations, by the unanimous consent of their stockholders, to accept the additional powers granted by that act, and to exercise them with the same efficiency to every intent, as if they had been conferred by the original acts of incorporation. The exercise of these powers by the stockholders of those corporations, in authorizing the contract of July 9th, 1850, at a meeting held for that purpose, without any objection on the part of any one of them, either at the time or subsequently, is sufficient ground of presumption that the corporations, as such, had accepted them as part of their organic law; and that the stockholders all concurred in the action then taken, and that they assent to its effect for all legitimate purposes touching the rights, either of the

corporation or of themselves individually, as members of such corporation. *Ib.*

3. The claim that the indentures of August 24th, 1849, and July 9th, 1850, are not a lease and security for rent, but a pretext and cover under which the Vermont Central Railroad Company went on and built, with its own funds and means, the Vermont and Canada Railroad, the same as if the latter company had not existed, the pretended taking of stock in that company being in fact a loan of money by the stockholders to the Vermont Central Railroad Company at a guaranteed interest of eight per cent.,—this claim, on the part of the defendant Sohler, discussed and held unfounded. *Ib.*

4. The Legislature of Vermont, by the acts of November 18th and November 25th, 1858, (acts of 1858, pp. 182 and 185,) in regard to the time of completion of the Vermont and Canada Railroad, and the mode of the operation of that road, in case the charter of that company should become forfeited, did not undertake to declare a forfeiture, but only to prescribe the consequences to flow from certain future acts and omissions on the part of that company. The question, therefore, whether a forfeiture of the charter of that company has occurred, can only be determined in a proper judicial proceeding brought in behalf of the public, for the purpose of testing that question. *Ib.*

5. In the present posture of the case, the time for the completion of the Vermont and Canada Railroad, as fixed by the legislature in 1859, not having expired; *held*, that there has not been such a failure on the part of the orators to perform the undertakings on their part in the instruments of lease, or the requirements of their charter and the amendments thereto, as will discharge the Vermont Central Railroad Company, or the trustees or bondholders under the first mortgage of that road, from the obligation to pay rent for such portion of the Vermont and Canada Railroad as has been completed, and proffered for acceptance, or from their subjection to the pledge of the tolls, etc., of both roads, as security for such rent. *Ib.*

6. *Held*, therefore, that the indenture of August 24th, 1850, is a valid instrument between the parties, and that of July 9th, 1850, is valid in constituting a pledge and lien, by way of security for the payment of the stipulated rent, upon the tolls, fares, and incomes of the two roads, in priority to the trustees and bondholders, and that the same is enforceable for the rents in arrear of the Vermont and Canada Railroad, as already constructed and used. *Ib.*

7. *Held*, that though as an open question, independently of the action of the parties, it would seem that the contract of lease contemplated that the sum on which the eight per cent. should be cast, to arrive at the amount of rent to be paid by the Vermont Central Railroad Company, was to be the actual outlay of money directly for the construction of the Vermont and Canada Railroad; still the meaning put upon the contract by the parties themselves by the payment of rent and the adjustment of accounts, appears so clearly to have been that the cost of construction should be measured by the capital stock of the Vermont and Canada Company paid in, with interest on the expenditures from the time they were made in pursuance of the contract of lease, that such must be taken to be the true meaning of the contract in that respect. *Ib.*

is conclusive as to all matters therein adjudicated, in a subsequent action between the covenantor and covenantee. *Knapp v. Marlboro*, 235.

2. A verdict and judgment is conclusive evidence, between the same parties in a subsequent suit, of whatever it was necessary for the jury to have found in order to warrant the verdict in the former action, and no further. *Town v. Lamphere*, 365.

See EXECUTION 1.

JURISDICTION.

1. Where one had an account for articles sold to another, who, soon after the purchase, became associated in partnership with a third person, and the creditor severed his account, and brought two suits before a justice of the peace, one against the purchaser of the articles alone, and the other against the latter and his new co-partner jointly, the severance of the account, which was altogether more than one hundred dollars, bringing the amount claimed in each suit within the jurisdiction of the justice; *held*, that as the plaintiff appeared, from the facts proved, to have brought the suit against the firm in good faith and upon reasonable grounds of belief that he could sustain the action against the co-partner of the purchaser for that portion of his account embraced in such action, the plaintiff was justified in severing that portion of the account from the other, although, as it resulted, the purchaser's partner was not in fact liable to the plaintiff, who obtained judgment only against the purchaser; and that the justice, therefore, had jurisdiction of both cases. *Reed v. Stockwell et al.*, 206.

2. When payment is made on book and credited on the account, the debit side of the book will remain unchanged, and the jurisdiction of the case be unaffected; otherwise, if, by the agreement of the parties, the balance due be transferred to a new account. *Willard v. Collamer*, 594.

See REFERENCE 8, 9.

JUSTICE OF THE PEACE, See JURISDICTION 1; OATH OF OFFICE 1, 2, 3; REFERENCE 8, 9.

LEVY OF EXECUTION, See EXECUTION 1, 2, 3, 4.

LICENSE.

The owner of premises consisting of a saw mill, grist mill, water privilege and lands adjacent, conveyed to A. in fee an undivided half thereof. The deed, after the description of the premises, contained the following words: "with the right to said A. to put in a mechanics' shop and planing mill between the saw mill and grist mill, and also to take water from the flume for the same, so as not to injure or interfere with the use of the water for the said mills or either of them, or such machinery as may be substituted for them." *Held*, that by this deed A. took, in addition to his undivided half interest in the whole premises, only a license to erect such buildings and occupy them, and use water for them, as above named, and that such license expired with the decay of the buildings. *Baldwin v. Aldrich*, 526.

See EVIDENCE 17; PARTITION 5, 6.

LIEN.

1. The manufacturer of starch is entitled to a lien on the same for the price of manufacturing, notwithstanding it was manufactured under a special agreement providing for the payment of such price in advance. *Ruggles v. Walker*, 468.

2. But this lien is purely a personal privilege and cannot be sold or transferred. It amounts only to a right of detaining the property until the price of manufacture is paid, and the retention of the possession of the property, or a portion of it, is essential to its continuance. *Ib.*

See RAILROAD 6.

LISTERS.

1. While in relation to most of the duties of listers, they involve so much of matter of judgment and discretion, and partake so much of the nature and character of judicial proceedings, that their judgment, exercised in good faith, and without malice, is conclusive in their favor, yet in relation to setting real estate in the list to the owners or the persons liable to pay taxes thereon, so far as relates to the persons to whom the land is to be set and the number of acres, the listers are bound to act in good faith, and with common care, skill and prudence, and if they so act they are not liable for mistakes or inaccuracies; but if not, they are liable to the party injured for the consequences of such mistakes, oversights or inaccuracies. *Wilson v. Marsh et al.*, 352.

2. The statute requiring the listers to make an appraisal of real estate once in five years, was obviously intended to give a degree of permanency to the list for that period, with such intermediate changes as the changes of ownership or occupancy, or the erection or destruction of buildings may require, and the listers between the years of such appraisal have a right to rely on it as correctly made up, and to make it the basis of a new list, and they cannot be charged with negligence for not discovering and correcting errors arising from events subsequent to the making of such list, unless they are of such an extent and character and so obvious as to be equivalent to notices. *Ib.*

See GRAND LIST.

LOBBYING, See ILLEGAL CONTRACT 1, 2.

LOST INSTRUMENTS. See EVIDENCE 4, 5.

MANUFACTURER'S LIEN. See LIEN 1, 2.

MARRIED WOMAN.

1. A warranty deed by the husband does not estop the wife from enforcing a prior mortgage on the same property held by her as her separate property, against the husband's grantee, and those holding under him. *Bartlett & wife v. Boyd*, 256.

2. The acquiescence of the husband in line fences and boundaries of land will not affect the rights of the wife, when the land is her separate estate. *Sawyer v. Coolidge*, 302.

See CHANCERY 1, 2; WITNESS 1, 2.

MARSHALLING.

1. When premises incumbered by mortgage are sold by the mortgagor in separate parcels to several purchasers, as between the purchasers the several parcels shall be charged with the burden of the mortgage in the inverse order of the time of alienation. *Root v. Collins et als.*, 173.

2. A parole sale of a part of mortgaged premises, followed by possession and improvements on the same by the vendee, is sufficient, as between the vendee and the mortgagor and those claiming under him, having actual notice of the parole sale, to throw the burden of the mortgage upon the part of the premises retained by the mortgagor. *Ib.*

3. And when a purchaser of a part of the premises retained by the mortgagor had no notice of the parole sale of the other part, but he purchased it as agent and held it in trust for another person who did have actual notice at the time of the purchase, *held*, that the notice was sufficient and that the part so purchased subsequent to the parole sale of the other part, should be charged with the whole mortgage. *Ib.*

MORTGAGE.

1. The defendant, with his wife, executed to the plaintiff a deed conveying to him, by its terms, certain real estate, but continued to hold possession of the premises. Upon the back of the deed, and prior to its execution and delivery, was endorsed an agreement, signed by the plaintiff, but not sealed, witnessed or acknowledged, whereby it was agreed in substance, that if the defendant should within five years from the date thereof pay to the plaintiff a certain sum of money therein named, (which was the same substantially as the consideration named in the deed, and was less than the admitted value of the premises,) "together with the use" of the premises conveyed by the deed, then the plaintiff should make and execute to the defendant a good and sufficient deed of the premises in question; *held*, that the deed and agreement endorsed upon it together constituted a mortgage, and that the defendant was therefore entitled to the possession of the premises until the condition of the agreement was broken. *Graham v. Stevens*, 166.

2. No other written evidence of a debt than that furnished by the instrument itself is necessary to sustain a mortgage. *Ib.*

See CHANCERY 1, 2; MARRIED WOMAN 1; MARSHALLING 1, 2, 3.

MORTGAGEE.

When the mortgagee took possession of the mortgaged premises, after breach of the condition of the mortgage, and held the same for a number of years, and the case was referred to a master to ascertain the rents and profits who reported a great loss on the same in proportion to the value and condition of the premises, although he found the mortgagee exercised a most faithful stewardship in the management of the premises, *held*, that although a mortgagee in possession is only bound to account for what he receives or might

receive from the mortgaged premises, by the use of fair, reasonable diligence and prudence, and if the premises are rented, and rents lost by the failure of a tenant without fault of the mortgagee he is not liable to account, still when the mortgagee himself occupies, and especially when the premises are a farm under cultivation, upon which labor and expenditures are to be bestowed to produce annual crops and profits, the mortgagee will be charged with such sum as will be a fair rent for the premises, without regard to what he may in fact have realized as profits from the use of them. *Sanders v. Wilson et al.*, 318.

See FIXTURES 1, 2, 3, 4.

NON-RESIDENT PROPRIETOR. See TAXES 2, 3.

NOTICE. See MARSHALLING 2, 3.

OATH OF OFFICE.

1. A justice of the peace, in an action against himself for an arrest under a warrant issued by him, cannot justify, if he had not, before such arrest, taken the oath of office prescribed by the constitution of the state.—*Courser v. Powers*, 517.

2. Nor will a subsequent administration of the official oath, on the same day of the arrest, enable him to do so, and the true time when such oath was taken may be shown.—*Ib.*

3. Neither will the taking of the official oath under an election to the same office for the previous year enable him to justify. The official oath is only commensurate with the appointment, and covers only the existing term of office.—*Ib.*

OFFICER.

1. An officer is not liable for the penalty imposed by the statute for neglecting or refusing to give a person a copy of the process by virtue of which he is arrested, unless he have process for such arrest in his hands at the time.—*McMahan v. Edgerton*, 77.

2. When an officer arrested a person on a warrant returnable forthwith before a justice of the peace, and the justice was absent at the time, and the officer placed the respondent in jail for safe keeping until the return of the justice, and for no other purpose, and did not leave with the jail keeper any warrant or copy, and thereupon the respondent demanded a copy of the process, on which he was detained, of the jail keeper, who was also sheriff of the county, and tendered the fees therefor, and the jail keeper neglected for more than six hours to give him a copy, it was held the jail keeper did not thereby become liable for the penalty imposed by the statute for neglecting or refusing for more than six hours after demand to give the prisoner a copy of the process by virtue of which he was detained.—*Ib.*

3. When the declaration omitted to aver that the defendant had process or a warrant for detaining the prisoner in his hands at the time of the demand for a copy, and no demurrer was interposed; it was held, nevertheless, that plain-

tiff was bound to show that fact on trial, as constituting an essential element in the offence charged.—*Ib.*

4. A receiptor of property attached, if entrusted therewith without the agency of the creditor, is the agent of the officer making the attachment, and for his torts or neglect in respect to the property the officer is liable.—*Gilbert and wife v. Crandall*, 188.

5. The insolvency of the receiptor, and his consequent inability to respond to a demand on the execution of the property, furnish no defence for the officer in an action by the creditor for not safely keeping the property to respond to the execution. *Ib.*

6. The direction by an attorney of an attaching creditor to the officer holding the writ not to attach real estate, does not relieve the officer from liability for not keeping personal property, attached by him upon the same writ, to respond to the execution. *Austin v. Burlington*, 506.

7. The consent of the attorney of an attaching creditor that the officer may take receiptors for the property attached, given generally, and without naming any receiptors or giving any expression as to the responsibility of those to be taken, and a request to the officer that, before he removes the property attached, he will go to the debtor and see if he will furnish receiptors, do not release the officer from his official liability for the responsibility of the receiptors, in case he allows the property to go into their hands. *Ib.*

8. An attaching officer, who delivers the property attached to receiptors and takes their accountable receipt therefor, is not discharged from liability to have the property to respond to the execution, by the fact that the receiptors, when taken, were actually responsible, but afterwards became insolvent. *Ib.*

See ADDITIONAL COUNTS 1; EXECUTION 5; FALSE IMPRISONMENT 1, 2; RECEIPTOR 2.

OFFSET.

Under our statute, unliquidated damages, growing out of contract, may be pleaded in offset. *Keyes v. Western Vt. Slate Co.*, 81.

OVERSEER OF THE POOR, See TOWN AGENT 1.

PARENT AND CHILD.

1. Where the relation of parent and child exists, and the child, after coming of age, and while in the parent's family, renders services and receives support, the law will not imply from such relation and the rendering of such service that there was a contract, either that the services of the child or the support furnished by the parent should be paid for. There must be proof either of express agreement for pay, or of such facts and circumstances as satisfactorily and fairly show that both parties at the time expected and understood that the services were to be paid for. *Putnam, Admin. v. Town, Ex'r*, 429.

2. But such proof is established by a fair preponderance of the evidence. It is not necessary that the proof in support of the claim for payment for such services should be full, unequivocal and conclusive. *Ib.*

3. The entry, after the rendition of such services, by the parent upon an account book of his opinion that his daughter was not entitled to be paid therefor, on the ground that she had been already fully paid, is not admissible in evidence in favor of his estate against the daughter's claim made after his death. *Ib.*

PARTITION OF REAL ESTATE.

1. If a petition for partition of real estate prays not only for partition, but also, in case the premises are found not divisible, for assignment or sale thereof, in accordance with the statute, a plea that the premises are not partible is not sufficient. *Baldwin v. Aldrich*, 526.

2. When real estate held in common cannot be divided without great inconvenience to the parties interested, the fact that the plaintiff is not hindered in the enjoyment of his share of the rents and profits of the premises, furnishes no ground why the court, upon a proper petition to that effect, should refuse to order an assignment of the whole to one of the parties, or a sale for the benefit of all of them, in accordance with the statute. *Ib.*

3. The dictum of HUTCHINSON, J., in *Brown v. Turner et al.*, 1 Aikens 350, on this point, considered and disapproved. *Ib.*

4. If on trial of a petition for partition it appears that the parties are tenants in common of only a part of the premises described in the petition, the court will proceed to make partition, assignment or sale, as the case may require, of that part. *Ib.*

5. So also, if one of the parties being a tenant in common in fee of the premises with the others, has in addition a license exclusively to use a portion of them for a particular purpose, and so long as certain structures thereon endure, this fact furnishes no reason why partition, assignment or sale, in accordance with the statute of partition should not be made of so much of the premises as are not covered by such licence. *Ib.*

6. But partition will not be made of the reversionary interest in the premises covered by the license. *Ib.*

PARTNERSHIP.

1. When two or more persons agree to become partners, and actually proceed to carry into execution the joint undertaking or business, the relation of partners will exist, although the conditions of the partnership are not understood alike by the partners. *Cook v. Carpenter & Cook*, 121.

2. A dormant partner need not be joined in a suit in favor of the firm against their debtor. *Waite & Co. v. Dodge*, 181.

3. A partner whose name is not known or used in the business of the firm, is a dormant partner. *Ib.*

4. An ostensible though nominal partner, having no interest in the firm, may yet be joined in a suit in favor of such firm. *Ib.*

PARTY. See EVIDENCE 15.

PAUPER.

1. An actual commitment to jail is sufficient to cast the duty of providing for the relief of an imprisoned pauper, who stands in need of such relief, on the jailor and on the overseer of the town where the jail is situated, after proper notice has been given agreeably to the statute, and this duty is in no way dependent upon the regularity of the processon which he is committed. *Newfane v. Dummerston*, 184.

2. A settlement in a town having been established, the legal presumption is, until the contrary is shown, that it continues there. *Ib.*

3. Under the pauper act of 1817, residence is computed only from the time of registry. *Ib.*

4. Under the pauper act of 1823, no residence prior to that time, without registry, can be included to make a future settlement. *Ib.*

5. Where a person leased a farm to carry on at the halves, and the same was put in the list to himself and the lessor jointly, held that such person did not hold the land in his "own right" so as to give him a settlement under the pauper act of 1817. *Ib.*

PAYMENT.

1. The plaintiffs had an account against the defendants, H. & M., as partners, also an unsettled account against H. individually and another against the firm of H. & Bro. C., one of the plaintiffs, settled all these accounts by receiving H.'s individual promissory notes for their amount. At the time of the settlement, M., one of the defendants, objected to the settlement of H. & M.'s account in that way, saying that H. & M. preferred to pay their own debts; but C. replied that he preferred to do so, as he knew H., and was not afraid to trust him. On giving the note, H. charged the firm of H. & M. with the amount of their account included in the note, and the plaintiffs credited the note received, and balanced the accounts so settled. Some time afterwards M. requested the plaintiffs to send him a statement of their account against the then late firm of H. & M., which he received, consisting only of items which had accrued subsequently to the time the note of H. was given. The court, assuming that the case was to be governed by the laws of the State of New York, where the accounts were made, under which the fact of taking the note either of the debtor or of a third person for a pre-existing debt, does not discharge the debt without an express agreement to that effect between the parties, held, that the facts showed such an express agreement of the parties that the note was to be received by the plaintiffs in payment of the defendants' account, as rendered it operative as such payment even under the laws of that state. *Robinson et al. v. Hurlburt et al.*, 115.

2. The language "express agreement," in the cases upon this point, does not mean an agreement in any particular express terms or form of words, but is used to denote the result of a mutual understanding and meeting of the minds of the parties, in contra-distinction to an agreement implied by law. *Ib.*

See ADDITIONAL COUNTS 7; BILL OF EXCHANGE 6; REMITTANCE.

PLEADING. *See* ABATEMENT; ADDITIONAL COUNTS; DAMAGES 1; OFFICER 3.

PLEDGE. *See* RAILROADS 6.

POOR OVERSEER OF. *See* TOWN AGENT.

PRACTICE.

Upon the coming in of the jury disagreed, counsel for the first time requested the court to administer certain instructions; it was *held* that the court would be justified in disregarding the request. The rule of practice requires that any special requests to charge the jury should be presented to the court at the opening of the argument on behalf of the party making the request. *Cady v. Owen*, 598.

See REFERENCE 1, 6; RELATIONSHIP 2.

PRESUMPTION. *See* COVENANT 2; SCHOOL DISTRICT 5, 6.

PRINCIPAL AND AGENT.

1. Where the defendant proposed to sell the plaintiff a quantity of cheese, and told the plaintiff that if he notified him the next day, the plaintiff should have it on the terms proposed, and the next day the plaintiff sent L. to the defendant for the purpose, and no other, of notifying the defendant that he would take the cheese on the terms proposed, and to pay the defendant ten dollars, and thereupon the defendant refused to take the ten dollars unless the plaintiff would take, and pay for, the cheese by the middle of the week following, and L. told the defendant that the plaintiff would take and pay for it by that time, and if he did not the ten dollars would be forfeited; *held*, 1st. That the refusal of the defendant to accept the ten dollars unless the cheese should be taken by the middle of the week following was a repudiation of the proposal of the preceeding day, which he had a right to make. 2d. That L. had no authority to bind the plaintiff to take and pay for the cheese the next week following. 3d. That the plaintiff not having affirmed the agreement of L. by offering to take and pay for the cheese by the middle of the week following, the defendant was not liable for refusing to deliver it afterwards. 4th. That the ten dollars, having been paid on conditions which L. had no right to make, might be recovered in this suit. *Sprague v. Train*, 150.

2. A father and son being both named D. F., the father purchased a piece of land, taking the deed to D. F., Jr., describing him as of the town where they both resided, and himself executed notes for part of the purchase money and a mortgage of the land to secure the same, by the name of D. F., Jr., and said nothing of his acting as agent for his son, and the grantor supposed the father was in fact the purchaser, that his name was D. F., Jr., and that he was deeding the land to the father. Some of the evidence tended to prove that the son had authorized the father to buy the place in his, the son's, name, and that he paid either directly or indirectly the whole price thereof. *Held*, that it was a question of fact for the jury to decide whether the son was or was not the real principal and the purchaser of the land, and that if they

found he was, then the title vested in him and not in the father. *Prentiss v. Blake et als.*, 480.

3. When one is not merely a messenger for the principal to receive proposals for a trade, but fully negotiates a trade and pays part of what is to be the price if the principal approves the trade, and the bargain is completed by the principal substantially upon the terms the agent has thus agreed upon, the principal will stand charged with knowledge of whatever was communicated to such agent in the course of the negotiation. *Hill v. North*, 604.

See ACCORD AND SATISFACTION 3, 4; BILL OF EXCHANGE 11, 12.

PROCESS. See OFFICER 1, 2.

PROMISSORY NOTE.

1. A partial failure of consideration cannot be set up as a defence to a note. *Cragin v. Fowler et al.*, 326.

2. Where the thing which was purchased was valueless as it was purchased, and for the purpose for which it was purchased, it is no answer for the vendor, in a suit upon the note given for the purchase money, to say to the vendee, you have, after all, got something that can be made useful in some different manner, or for some other purpose. The purchaser has a right to that for which he bargained, and it must be of some value, or he is not bound to pay for it. *Ib.*

See ADDITIONAL COUNTS 1; ASSUMPSIT; PAYMENT 1, 2.

RAILROADS.

1. The contract of lease between the Vermont and Canada Railroad Company, and the Vermont Central Railroad Company, made August 24th, 1849, and the addition thereto made July 9th, 1850, were not *unlawful* in the sense of being in violation of some public law, or contrary to public policy. Those corporations themselves and their stockholders having assented to the validity of those contracts, it is not competent for a bondholder, under the first mortgage of the Vermont Central Railroad Company, which mortgage was given in express recognition of and subjection to those contracts, to object to their validity on account of the want of capacity of those corporations to make them. *Vt. & Can. R. R. Co. v. Vt. Cent. R. R. Co. et al.*, 2.

2. Though the charters of those corporations did not authorize such contracts, the general act of 1847 (Comp. Stat. chap. 28,) did; and it was competent for the corporations, by the unanimous consent of their stockholders, to accept the additional powers granted by that act, and to exercise them with the same efficiency to every intent, as if they had been conferred by the original acts of incorporation. The exercise of these powers by the stockholders of those corporations, in authorizing the contract of July 9th, 1850, at a meeting held for that purpose, without any objection on the part of any one of them, either at the time or subsequently, is sufficient ground of presumption that the corporations, as such, had accepted them as part of their organic law; and that the stockholders all concurred in the action then taken, and that they assent to its effect for all legitimate purposes touching the rights, either of the

corporation or of themselves individually, as members of such corporation. *Ib.*

3. The claim that the indentures of August 24th, 1849, and July 9th, 1850, are not a lease and security for rent, but a pretext and cover under which the Vermont Central Railroad Company went on and built, with its own funds and means, the Vermont and Canada Railroad, the same as if the latter company had not existed, the pretended taking of stock in that company being in fact a loan of money by the stockholders to the Vermont Central Railroad Company at a guaranteed interest of eight per cent.,—this claim, on the part of the defendant Sohler, discussed and held unfounded. *Ib.*

4. The Legislature of Vermont, by the acts of November 18th and November 25th, 1858, (acts of 1858, pp. 182 and 185,) in regard to the time of completion of the Vermont and Canada Railroad, and the mode of the operation of that road, in case the charter of that company should become forfeited, did not undertake to *declare a forfeiture*, but only to prescribe the consequences to flow from certain future acts and omissions on the part of that company. The question, therefore, whether a forfeiture of the charter of that company has occurred, can only be determined in a proper judicial proceeding brought in behalf of the public, for the purpose of testing that question. *Ib.*

5. In the present posture of the case, the time for the completion of the Vermont and Canada Railroad, as fixed by the legislature in 1859, not having expired; *held*, that there has not been such a failure on the part of the orators to perform the undertakings on their part in the instruments of lease, or the requirements of their charter and the amendments thereto, as will discharge the Vermont Central Railroad Company, or the trustees or bondholders under the first mortgage of that road, from the obligation to pay rent for such portion of the Vermont and Canada Railroad as has been completed, and proffered for acceptance, or from their subjection to the pledge of the tolls, etc., of both roads, as security for such rent. *Ib.*

6. *Held*, therefore, that the indenture of August 24th, 1859, is a valid instrument between the parties, and that of July 9th, 1850, is valid in constituting a pledge and lien, by way of security for the payment of the stipulated rent, upon the tolls, fares, and incomes of the two roads, in priority to the trustees and bondholders, and that the same is enforceable for the rents in arrear of the Vermont and Canada Railroad, as already constructed and used. *Ib.*

7. *Held*, that though as an open question, independently of the action of the parties, it would seem that the contract of lease contemplated that the sum on which the eight per cent. should be cast, to arrive at the amount of rent to be paid by the Vermont Central Railroad Company, was to be the actual outlay of money directly for the construction of the Vermont and Canada Railroad; still the meaning put upon the contract by the parties themselves by the payment of rent and the adjustment of accounts, appears so clearly to have been that the cost of construction should be measured by the capital stock of the Vermont and Canada Company paid in, with interest on the expenditures from the time they were made in pursuance of the contract of lease, that such must be taken to be the true meaning of the contract in that respect. *Ib.*

8. It is not enough, in order for the bondholders to avoid the effect of the contract, as understood and acted upon by the two companies in this respect, to show that as between themselves and the Vermont Central Railroad Company it would be prejudicial and unjust to them to give the contract that effect; but they must also show that it would be inequitable on the part of the Vermont and Canada Company as against them to have such effect given to it. This they have failed to show. *Ib.*

9. The compromise agreement of April, 1857, between the two corporations, that the sum of thirty-two thousand six hundred and seventy-two dollars and fifteen cents should be added to the cost of construction of the Vermont and Canada Railroad, though possibly effective as a settlement between the parties themselves, is not binding upon the trustees and bondholders, they having previous to that time supplanted the Vermont Central Company in the immediate interest to be affected by the allowance of that claim; and, the masters having failed to find that that sum was a part of the costs of construction, the same is disallowed. *Ib.*

* 10. The orators' claim for incidental expenses disallowed. *Ib.*

11. The sum on which, as cost of construction, the eight per cent. is to be computed as the measure of the rent due the orators, fixed at one million three hundred and forty-eight thousand five hundred dollars. *Ib.*

12. The mortgage by a railroad company of its road and appurtenances, and its franchise, as a security for debt, does not convey its corporate existence or its general corporate powers, but only the franchise necessary to make the conveyance productive and beneficial to the grantees, to maintain and manage the railroad, and receive the tolls and profits thereof for their own benefit. *Eldridge v. Smith et als.*, 484.

13. The Vermont Central Railroad Company, for the purpose of securing the payment of its bonds, conveyed in trust and mortgage to certain persons their "railroad and franchise, and, also, all the station houses, engine houses, etc., and other appendages, with all the lands thereto belonging and intended for the use and accommodation of said road." *Held*, that only such land of the company passed by this conveyance, as was so connected with, and used by the company for, the railroad, that they would have been authorized to take it compulsorily under the provisions of their charter; and that, if it was so connected and used, it was immaterial whether it actually was taken by proceedings *in invitum*, or purchased by the company. *Ib.*

14. *Held*, also, that the words in the conveyance, "*intended for the use and accommodation of said road*," applied to the intention of the company in respect to the use of the land at the time the mortgage was executed, and not to the original design of the company when they purchased it. *Ib.*

15. *Held*, That such mortgage conveyed the full and entire surveyed line of the railroad to its whole extent. *Ib.*

16. The manufacture of railroad cars is not so legitimately and necessarily connected with the management of a railroad, that the railroad company would be authorized by its charter to take lands compulsorily for the purpose of erecting such a manufactory thereon. *Ib.*

17. So, also, in respect to the erection of dwelling houses, to rent to the employees of the company. *Ib.*

18. Otherwise, as to land taken for piling the wood and lumber used on the road, and brought to it to be transported thereon. *Ib.*

19. When land is taken for a legitimate railroad use within the scope of its charter by a railroad company, the judgment of the locating officers of the company is conclusive as to the quantity required for that purpose, unless the quantity taken is clearly beyond any just necessity. *Ib.*

20. The first mortgage of the Vermont Central Railroad and its appurtenances, in the description of a portion of the property conveyed, contained the following words: "And all other personal property belonging to said company, as the same now is in use by said company, or as the same may be hereafter changed or renewed by said company." *Held*, that these words did not embrace certain machinery for "burnetizing" ties and timber so as to render them more durable, which machinery was not in existence at the time of the mortgage and took the place of nothing that was therein specified, but was constructed by the railroad company as a new experiment after the execution of the mortgage. *Brainerd et als. v. Peck & Colby*, 496.

21. In the conveyance of property acquired subsequently to the first mortgage, made by the Vermont Central Railroad Company to the trustees under that mortgage, on the 12th of May, 1854, the following words of description were used: "All the articles of personal property acquired by the company since the date of the mortgage, consisting, among other things, of the following, to wit," and then followed an enumeration, by name, of several engines, and, by number, of several different kinds of cars: *Held*, that the general words were to be construed as referring to articles of the same nature and kind as those specifically named. *Ib.*

See CORPORATION 1.

RAMS, RESTRAINT OF.

1. The forfeiture provided for in sections four and six of chapter ninety-six of the compiled statutes, and in the act of 1856 in amendment thereof, are distinct and independent forfeitures, and both may be enforced by the same party. *Town v. Lamphere*, 365.

2. The decision of the case of *Hall v. Adams*, 2 Aik. 130, considered and approved. *Ib.*

RATIFICATION. See CORPORATION 6.

RECEIPT. See EVIDENCE 18, 19.

RECEIPTOR.

1. The legal meaning of the contract of a receiptor is, that he will have the property attached forthcoming, upon demand made for the same by the officer, to respond to the execution that may issue upon the judgment obtained in the suit in which the property is attached. *Dewey v. Fay*, 138.

3. When the receiptor actually has the property in his possession, and the execution expires in the hands of the officer, without any demand made for the property to apply on the execution, the debtor is entitled to a return of his property free from the lien created by the attachment. Neither the creditor, the officer, nor the receiptor may withhold it from him. *Id.*

3. If there is no demand made upon the receiptor for the property, within the life of the execution, he is discharged from his liability to the officer. *Id.*

See OFFICER 4, 5, 8.

RECOUPMENT. *See DAMAGES 1.*

REFERENCE.

1. Where parties agree to an arbitration or reference of a pending action, under a rule of court that the court shall render a judgment upon the report or award, even when it is a part of the rule of reference, that the arbitrator or referee is to be governed by the rules of law, it is the cause of action which forms the basis of submission, and not the particular form of the declaration, nor any particular issue which may have been formed upon it; and the arbitrator or referee is not bound by the particular declaration and pleadings, but may award upon the subject matter of the suit without regard to them. *Cook v. Carpenter & Cook, 121.*

2. The power of an arbitrator or referee extends to just what the parties have agreed to submit, and no more; and if he undertakes to try and award upon matters not submitted, the award will be invalid. *Id.*

3. Therefore, where the declaration was general assumpsit, and the cause of action which formed the basis of submission was money paid for the benefit of the defendants on a certain note which the plaintiff claimed to have signed as surety for the defendants, it was held, that the referees had no power under the submission to inquire about, and report in respect to, partnership dealings between the parties, and the referees having so done, and awarded a balance due to the plaintiffs, the court refused to pronounce judgment thereon. *Id.*

4. But, whether, in such case, if the submission be extended, by consent of the parties, before the referees, the rule would be different, *quere?* *Id.*

5. If a referee hears and determines other matters than those embraced in the issue formed in the case referred to him, it is not error, provided the other matters are such as might be brought into the case under any amendment which the county court could legally have allowed the party to make to his pleadings. *Sumner v. Brown, 194.*

6. Such amendments to the pleadings are liberally allowed by the courts as tending to promote trial and determination on the subject matter in controversy upon which the action was originally really based; but no amendment can be allowed which introduces into the case a new substantive cause of action different from that declared upon and different from that which the party intended to declare upon when he brought his action. *Id.*

7. Therefore, where the plaintiff, who had only two cows, and had sued the defendant, who was deputy sheriff, in trespass for attaching one of the cows, on the ground that the cow was exempt from attachment by law, offered on the trial before a referee to prove that on the next day after the cow in suit was attached, the defendant came and took away the other cow also, and converted her to his own use; *Held* that such proof could not have been properly admitted by the referee. *Ib.*

8. If a justice of the peace, not having jurisdiction of a suit, by reason of the amount in controversy, tries it, and the judgment is appealed from to the county court where it is referred by the parties to a referee for trial, the parties thus creating a tribunal of their own selection for the trial, thereby waive the objection which they might have made to the jurisdiction of the court. *Reed v. Stockwell et al.*, 206.

9. And especially so, where by the terms of the referee the objecting party agreed to interpose no motion to dismiss if the suit was tried by the referee. *Ib.*

RELATIONSHIP.

1. One is disqualified to act as auditor in the trial of an action of book account, whose wife is first cousin to the wife of one of the parties. *Clapp v. Foster*, 580.

2. Though the county court might in their discretion refuse to allow a party to make such an objection to an auditor after he had rendered his report, still it would not be error for such court to sustain that objection, even if made for the first time at so late a period of the case. *Ib.*

REMITTANCE.

The defendants being commission merchants in Massachusetts, and having in their hands produce belonging to the plaintiffs, who resided in Vermont, to sell for them, the plaintiffs gave a single special order in respect to a remittance of part of the avails of such sale to them in a particular way. *Held*, that this did not authorize a remittance by the defendants at the risk of the plaintiffs of the balance of the funds in the same way, and that in the absence of any express authority such remittance was at the risk of the defendants. *Dodges v. Smith & Waite*, 178.

REPRESENTATIONS. *See FRAUDULENT REPRESENTATIONS.*

RES GESTA. *See EVIDENCE* 6, 16.

SALE.

1. The plaintiffs agreed to sell their farm to the defendant for twelve hundred dollars, and to take for it the farm of one G.—which they examined, before the bargain was completed—at the same price, provided G. would not take a less price for his farm. The defendant agreed with G. for his farm at a less price, but represented to the plaintiffs that G. would not take less than twelve hundred dollars, and the trade with the plaintiffs was thereupon completed, the plaintiffs declaring at the time that they were not “swapping” farms, but buying and selling. It appeared that the plaintiffs were deceived

by the defendant as to the amount paid by the latter to G. for his farm, and would not otherwise have traded without the payment to them of the difference between the twelve hundred dollars and the sum for which the defendant bought the G. farm. There was, however, no agreement or promise to pay to the plaintiffs anything more than the G. farm for theirs: *Held*, that the transaction was not an exchange of farms without reference to price, but a sale by the plaintiffs to the defendant, with the understanding that they were to take in payment the G. farm only at the price for which it was bought of G.; and that the plaintiffs were therefore entitled to recover in assumpsit against the defendant the difference between the twelve hundred dollars and the amount paid for the G. farm by the defendant. *Jorden and Wife v. Dyer*, 104.

2. If A., by parol contract, purchase goods of B., to be delivered at a future day, and earnest money be paid, a sale of the goods by B. to a third person before the time for the performance of the contract with A. has expired, will entitle A. to recover of B. the earnest money so paid, under the money counts, and will excuse A. from any duty to tender performances on his part. *Packer v. Steward*, 127.

3. And if A., after such sale by B. to a third person, and before the expiration of the time limited for the performance of his contract, tender the performance of it on his part, he may maintain an action against B. for the recovery of proper damages for such breach of contract. *Id.*

4. The plaintiff bought from G. a mare, supposed by the parties to be with foal, agreeing to give for her the colt (which the mare was expected to have,) when it should become four months old. The mare was in fact not with foal at the time, and had no colt while the plaintiff possessed her, and the plaintiff never paid to G. any colt, or anything else, for the mare. The plaintiff kept possession of the mare nearly three years, when she was attached by the defendant, as deputy sheriff, at the suit of a third party as the property of G., and taken from the plaintiff's possession. *Held*, that the title to the mare passed to the plaintiff on the completion of the contract with G., and the fact that it was impossible for the plaintiff to pay for her in the manner agreed upon, did not render the sale void,* but only rendered the plaintiff liable to pay for the mare in another way. *Reed v. Canady*, 198.

5. *Held*, also, that even if the contract was of such a character that G. might have rescinded it and insisted upon a return of the mare, yet, as he had not done so, a third person could not interfere and set aside a contract with which the parties appeared satisfied, and which was not made in violation of such third person's rights or interest. *Id.*

See CONTRACT, 1, 2, 3; FRAUDULENT REPRESENTATIONS; TRESPASS, 2.

SCHOOL.

1. A town superintendent of schools appointed by the selectmen to fill a vacancy in the office, may, while in office, grant a certificate to teach school, which will be good for one year from the time it is granted, although the term of office of such superintendent may have expired before the termination of such year. *Holman v. School District*, 270.

2. Where a teacher obtained a certificate to teach for one year from the 17th of December, 1857, and in the summer of 1858 was employed by the defendant to teach school for the winter next ensuing, and pursuant thereto taught such school for five weeks before the certificate expired, and six weeks afterwards, without obtaining a new certificate, *Held*, that inasmuch as she had a certificate when she was employed and actually commenced the school, she might recover for the services performed both before and after the expiration of the certificate. *Id.*

SCHOOL DISTRICT.

1. A committee appointed by a school district to remove the school house of the district, has no authority to assess the tax to defray the expenses of such removal, or to make out the rate bill of such tax or certify to its correctness, notwithstanding the money for the purpose was voted by the district; nor can the district confer any such authority upon such committee. The prudential committee of the district is alone authorized by law (Sec. 41, Chap. 20, p. 149, Com. Stat.,) to assess and certify the tax. *Johnson v. Sanderson*, 94.

2. Therefore a tax warrant issued to the collector of the district by a justice of the peace, upon a rate bill made and certified by the committee appointed to remove the school house, conferred no authority upon him to collect the tax, though it was assessed to defray the expenses of such removal. *Id.*

3. The 7th section of Chap. 81, Com. Stat. (p. 463) construed. *Id.*

4. A school district can raise money for building a school house or supporting a school only by vote of the district in a meeting legally warned. The prudential committee are only authorized by statute, to assess a tax on the list of the district "after the vote of the district for that purpose." Nor does the act of 1850 (Comp. Stat., Ch. 20, sec. 44, p. 147,) requiring districts to raise teachers' wages upon the grand list, authorize the prudential committee to assess a tax therefor without a vote of the district. *Bowen v. King*, 156.

5. Although no statute existed in this state prior to the year 1808, by which inhabitants of different towns could be united in one school district by action of such towns, and therefore no presumption of law could be raised, in the absence of record evidence of the organization of such district, that it had been created prior to that year, by the action of such towns; yet such a district might, previous to that year, have been constituted by special act of the Legislature; and where such district had been in continued existence for more than twenty-five years prior to 1808, with the continued acquiescence of the towns out of which it was created, as well as of the inhabitants of the district itself; *held*, that the original creation of the district by act of the Legislature might well be presumed. *Id.*

6. And where portions of three towns had acted together as a union district for more than fifteen years subsequently to the act of 1808, (Slade's Statutes, 593, No. 2,) authorizing towns to form such districts, before any action was taken by the district or by the towns out of which it was formed, implying any doubt as to the perfect legality of the district; *held*, that this was sufficient to raise the presumption, in the absence of evidence as to the formation of

the district, that it was legally created and organized by a action of the constituent towns. *Ib.*

7. When a union district of this kind had existed more than fifteen years subsequently to the act of 1808, the district and one of its constituent towns, in which was the district school house, voted to accept into the district those portions of two other towns which had previously acted with, and been considered parts of the district; *held*, that this action could not be regarded as any evidence that the legal existence of the district was not already perfect, but was probably the result of over-caution, as there was no record evidence of the formation of the district; that although insufficient in itself to create a legal union district, it could not operate to destroy one already existing. *Ib.*

8. When such union district is once legally formed, it can only be dissolved by application to the county court under the statutes, (Comp. Stat. ch. 20, sec. 47, p. 150); neither of the towns out of which it is created can destroy it. *Ib.*

9. And *quere*, whether such districts are not entirely exempt from all control of the towns to alter their limits in any manner. *Ib.*

10. But where by vote of one of the towns a quantity of land in that town, owned by a person residing in another of the towns composing the district, was set off to the district, if the town and the district for any considerable time assented to and acquiesced in this alteration, all parties would be bound by it. *Ib.*

11. And if otherwise, the action of the town setting off the land to the district would be merely nugatory, and the land would become no part of the district. *Ib.*

12. A union district was composed of parts of three different towns, *Held*, that the relation to each other of these parts could not be such as is provided for by sec. 21, ch. 20, Comp. Stat., whereby a town may set one or more of its inhabitants to a district in an adjoining town, with the consent of such district; because the parts of the district embraced in two of the towns did not appear ever to have had, or claimed to have, any organization as districts themselves, so that persons of the third town could have been set to them under this statute; and on the other hand, the first mentioned two towns did not appear ever to have voted to set any of their inhabitants to the district in the third town, except a vote in one of those towns in 1851, after the union district had actually existed more than seventy years. *Ib.*

13. *Held* further, therefore, that the district in question being a union district composed of parts of different towns, one of these parts could not by its own action, or that of its town, dissolve the district, or act as a district by itself so as to elect legal officers or impose legal taxes. *Ib.*

14. School districts formed of parts of two or more towns may be dissolved, or their limits altered, by mutual consent. *Jones v. Camp*, 384.

15. The entire control by a town over a farm and its occupants, so far as relates to its school district taxation and connection, and the acquiescence in

such acts by the district from which such farm is set, for a quarter of a century, is equivalent to an express assent on the part of the district to the separation of the farm from the school district. After such a long period of acquiescence, it may fairly be presumed that the act of the town, making the alteration, had its origin in the express assent of the district. *Ib.*

16. *QUIRE*—Whether one town of its own will, without the consent of the other town and the district, and against their wishes, can set off a part of such district to another district. *Ib.*

SELECTMEN.

1. It is within the scope of the implied powers of selectmen to protect the interests of the town, by employing counsel in road cases, when the town agent employs none, and makes no objection to the employment by the selectmen; and the assent of the town agent will be presumed where no dissent is shown. *Burton v. Norwich*, 345.

2. Whether, in case of disagreement, the selectmen, or town agent, would have the paramount right in respect to the employment of counsel in road cases, *quare*. *Ib.*

SET OFF. *See* OFFSET.

SHERIFF. *See* OFFICER.

SLANDER.

In an action of slander, charging the defendant with having accused the plaintiff of the commission of the crime of adultery, it is competent for the defendant in mitigation of damages, to prove that the plaintiff, before the speaking of the words, was commonly reputed to be unchaste and licentious. *Bridgman v. Hopkins*, 532.

STATE.

1. The superintendent, appointed under the act "to provide for the rebuilding the state house," approved February 27th, 1857, (see Laws of 1857 p. 171,) purchased, for and in the name of the state, certain tools to be used in such work; and while such tools were on the land of the state adjacent to the state house, and in use upon such work under the direction of the superintendent, they were attached by the defendant as the property of their former owner. In an action of trespass *qu. cl. fr.*, and for taking these tools, commenced in the name of the state solely by direction of the superintendent, and prosecuted, not by the state's attorney, but by counsel employed by the superintendent, *held*, that the action was properly brought in the name of the state, and by proper authority, and that the defendant could not take advantage of the objection that it was not prosecuted by the state's attorney. *State v. Bradish*, 419

2. When there is no statutory provision to the contrary, actions in behalf of the state, or for its benefit, are to be brought in the name of the state whenever, upon common law principles, the legal interest in the subject matter is in the state. *Ib.*

STATE'S ATTORNEY. *See* STATE 1.

STATUTE OF FRAUDS. *See* FRAUDS, STATUTE OF

STATUTES CONSTRUED.

Comp. Stat. chap. 96, secs. 4, 6, in *Town v. Lamphere*, 365.
 No. 54, p. 58, Acts of 1856, in *Town v. Lamphere*, 365.
 Comp. Stat. chap. 81, sec. 7, in *Johnson v. Sanderson*, 94.
 No. 43, secs. 26, 27, Acts of 1855, in *Leach v. Blakely*, 134.
 No. 27, sec. 1, Acts of 1853, in *State v. Pratt*, 323.
 General Stat. chap. 114, sec. 1, in *State v. Briggs*, 501.

SUIT, COMMENCEMENT OF. *See* TRUSTEE PROCESS 3.

SUPREME COURT. *See* DEPOSITION 3.

TAXES.

1. Taxes become a fixed incumbrance upon the land upon which they are assessed as soon as the officer, having their collection in charge, proceeds officially so far as to manifest his intention to pursue the land for the purpose of enforcing the collection of the taxes. *Hutchins et al. v. Moody*, 433.

2. In the case of a non-resident proprietor, taxes become an incumbrance upon the land when the constable has, in accordance with sec. 24, chap. 81, of the Compiled Statutes, made a list of the land and the taxes assessed thereon, and deposited the same in the town clerk's office for record. *Ib.*

3. The land of H., then a resident of Vermont, was set in his grand list, after which he removed from this state, as it was generally supposed, to remain permanently absent, and left no personal property here: *Held*, that notwithstanding his return, in a short time afterwards, to another part of the state, the constable, having charge of the collection of the taxes assessed against him on such list, was justified in treating him as a "non-resident proprietor," and proceeding accordingly in the sale of the land for the taxes, provided he was not aware of the return of H. to the state, and the circumstances were not such as reasonably to put him on inquiry respecting such return. *Ib.*

See SCHOOL DISTRICT 1, 2, 3, 4, 13.

TENDER. *See* ACCORD AND SATISFACTION.

TOWN AGENT.

1. It was not the intent of the legislature, by the creation of the office of town agent, to deprive overseers of the poor of the authority to employ counsel for the town in matters within the scope of the duties of their office. *Burton v. Norwich*, 345.

2. In the administration of that portion of criminal justice, entrusted to towns, and in which the fine and costs collected go to the town, and which is conducted at the expense of the town, the necessity for legal advice

and assistance in many cases, is obvious, and the authority to employ counsel in such cases is lodged in the town grand juror, and not in the town agent. *Ib.*

3. It never was intended that town agents should take charge of criminal prosecutions; the statute creating his office and defining his duties, having reference only to civil suits; and his duties obviously pertain to pending litigation, and to the commencement of suits resolved upon, rather than to preliminary advice. *Ib.*

TOWN CLERK. *See EVIDENCE 11.*

TOWN GRAND JUROR. *See TOWN AGENT 2, 3.*

TOWNS. *See SELECTMEN 1, 2; TOWN AGENT 1, 2, 3; HIGHWAY SURVEYOR 1.*

TRESPASS.

1. To entitle a plaintiff to maintain trespass for personal property he must have at the time the property is taken by the defendant, either the actual possession of it, or title to it, with the right of present possession. *Hurd v. Fleming, 169.*

2. When property was sold by a conditional sale and the time of payment for the same by the vendee had not elapsed, and while in the possession of the vendee it was attached by one of his creditors, it was held that although the vendor continued the general owner of the property, yet not having the right of present possession, he could not maintain trespass for the property against the attaching creditor of the vendee. *Ib.*

3. The plaintiff had taken a deed of the land, of which the defendant had notice, but had not entered into actual possession, and the grantor remained upon the land after the deed was given, by mere sufferance, and without any right or claim of right; held, that under these circumstances, the plaintiff could maintain trespass *qu. cl. fr.*, for an entry by a third person upon the premises. *Chesley v. Brockway, 550.*

See DISCHARGE 1, 2; FALSE IMPRISONMENT 1, 2; FIXTURES 2, 3.

TROVER.

1. The law is too well settled in this State to be departed from, that one who purchases personal property of a person having it in possession, but who is not the true owner, and has no right to sell it, and takes possession, claiming title to it as owner, and puts it to use, is liable in trover to the owner, without demand or notice, although he purchased it in good faith, of one he supposed to be the true owner, and entitled to sell it. *Deering v. Austin, 330.*

2. But where the defendant took a cow of W., who was not the owner of the cow, but of this the defendant had no knowledge, to keep through the winter, under a contract that he might buy her in the spring, if W. did not pay him for her keeping, it was held that the defendant could not be regarded as a purchaser of the cow, or as claiming a right to her as owner. *Ib.*

3. W., who was the owner of a cow, on the 30th of August, 1859, turned her out to the plaintiff as security for a debt which he owed him, and delivered her into his possession, and the plaintiff kept her until October 30th, 1859, when W., not having paid the debt to the plaintiff, wrongfully took the cow into his own possession, and contracted with the defendant, who had no knowledge but that W. was the rightful owner, to keep the cow for him through the ensuing winter for eighteen dollars, with a provision that if W. did not pay the eighteen dollars in the spring, the defendant might purchase the cow and pay W. twenty dollars for her. December 3, 1859, the plaintiff sold his interest in the cow to one Fowler, who called on the defendant April 12, 1860, notified him of his title, and demanded the cow. Defendant refused to give her up. Except this there was no evidence of any conversion by the defendant, and it was *held*, that this was no evidence of a conversion in this suit, although it might have been in a suit in the name of Fowler. *Id.*

TRUSTEE.

One to whom certain property has been conveyed by his debtor, in trust for other parties, is not, by the obligation of his trust, precluded from purchasing or levying upon other property of the debtor for his own personal benefit. *Eldridge v. Smith et al.*, 484.

TRUSTEE PROCESS.

1. When the defendants, who were citizens of New York, assigned their property for the benefit of their creditors, and among the claims so assigned was a debt due to them from the trustees who were citizens of Vermont, but before notice to the trustees by the assignees, the debt, due from them to the defendants, was attached by trustee process by the plaintiff, who was a creditor of the defendants; *held*, the plaintiffs were entitled to hold the debt rather than the assignees. *Martin v. Potter & Co. and Trus.*, 87.

2. At the time of the service of the trustee process, the trustees were indebted to the principal debtor in a sum less than ten dollars. Afterwards and prior to the disclosure of the trustees, the principal debtor performed services for them to an amount much exceeding ten dollars; but the trustees disclosed that it had been their custom to pay him as often as he earned ten dollars, and it did not appear from the report of the commissioner to whom the case was referred, that the amount due from the trustees ever exceeded ten dollars at any one time; *held*, that under the law as it existed prior to the passage of act No. 16, of 1856, the latter fact should appear affirmatively upon the report to entitle the plaintiff to a reversal of the judgment of the court below discharging the trustees. *McDaniels v. Morton and Trus.*, 101.

3. The commissioner was unable to determine whether the writ issued before or after the enactment of No. 16, of the laws of 1856 (which exempts the personal earnings of debtors accruing to them after the service of the trustee process.) The writ was dated before the passage of the act, but was not served till about three months after its passage; *held*, that the time when the writ was actually issued must determine when the suit was brought; that its date was *prima facie* evidence of the time of its issue; but that in this case the length of time (four months) which elapsed between its date and service,

and the fact that the plaintiff's attorney who made it, was unable to say that it was made at its date, and said that it was not then put into the officer's hands, tended to show that it was not issued at its date; that it did not therefore affirmatively appear that the suit was brought before the passage of the act in question, or, consequently, that there was error in the judgment below discharging the trustees on account of such personal earnings of the principal debtor. *Ib.*

4. The claimants having demands against, and being liable as sureties for, the defendants, took from the latter an assignment of their stock of goods as security and indemnity for such demands and liabilities, and went with a deputy sheriff and put him in possession of the goods under the assignment. Afterwards, fearing that they might not be fully protected by such a proceeding, but not intending to abandon their rights under such assignment, they caused writs to be made in their favor against the principal debtor, and to be served by the same deputy, by attaching the property so assigned. These suits were regularly prosecuted to judgment, and executions issued thereon and placed in the deputy's hands. He sold the goods, but in their sale did not proceed as required by law in the case of sale on execution. Afterwards the deputy was summoned as trustee of the defendants. *Held*, that he was not chargeable as trustee to the extent of the actual demands of the claimants against, and their liability for, the defendants and the expenses of such sale. *Tilton et al. v. Müller & Co. and Trus.*, 576.

USURY.

When a witness testified that he supposed a note, by the laws of New York, was void for usury, but there was no evidence as to the provisions of the New York Statutes or what constitutes usury by the laws of that State; *held*, that the court did not err in not directing the jury that the note was void for usury, although it was payable at Troy, N. Y., and was not discounted here at 8 per cent. *Stark Bk. v. U. S. Pottery Co.*, 144.

WARRANTY.

1. A general warranty does not cover defects that are perfectly visible and obvious to the senses, and known to the party taking the warranty. *Hill v. North*, 604.

2. Where it was conceded that the defect complained of, so far as it was obvious and visible, was known to the purchaser or his agent, but it appeared that the seller represented that it did not injure the horse or affect him in the slightest degree, and the purchaser or his agent did not believe and had no reason to believe the defect was anything more than a mere blemish which would never render the horse less useful or capable of service; and the testimony tended to prove that in point of fact the defect was a real unsoundness at the time of the sale, it was *held*, that this was one of those equivocal defects that a warranty may well be considered as taken to guard against. *Ib.*

3. The rule excluding from a warranty such defects as are known to the purchaser, only applies to such as are perfectly obvious to the senses, and the effects and consequences of which may be accurately estimated, so that no purchaser would expect the seller intended to warrant against them; but all

other defects, though apparent to some extent, but still equivocal and doubtful in their character, as to whether they are permanent or temporary, or mere harmless blemishes, or but partially developed unsoundnesses, must be understood to be included and covered by a general warranty. *Ib.*

See FRAUDULENT REPRESENTATIONS 1, 2, 3, 4.

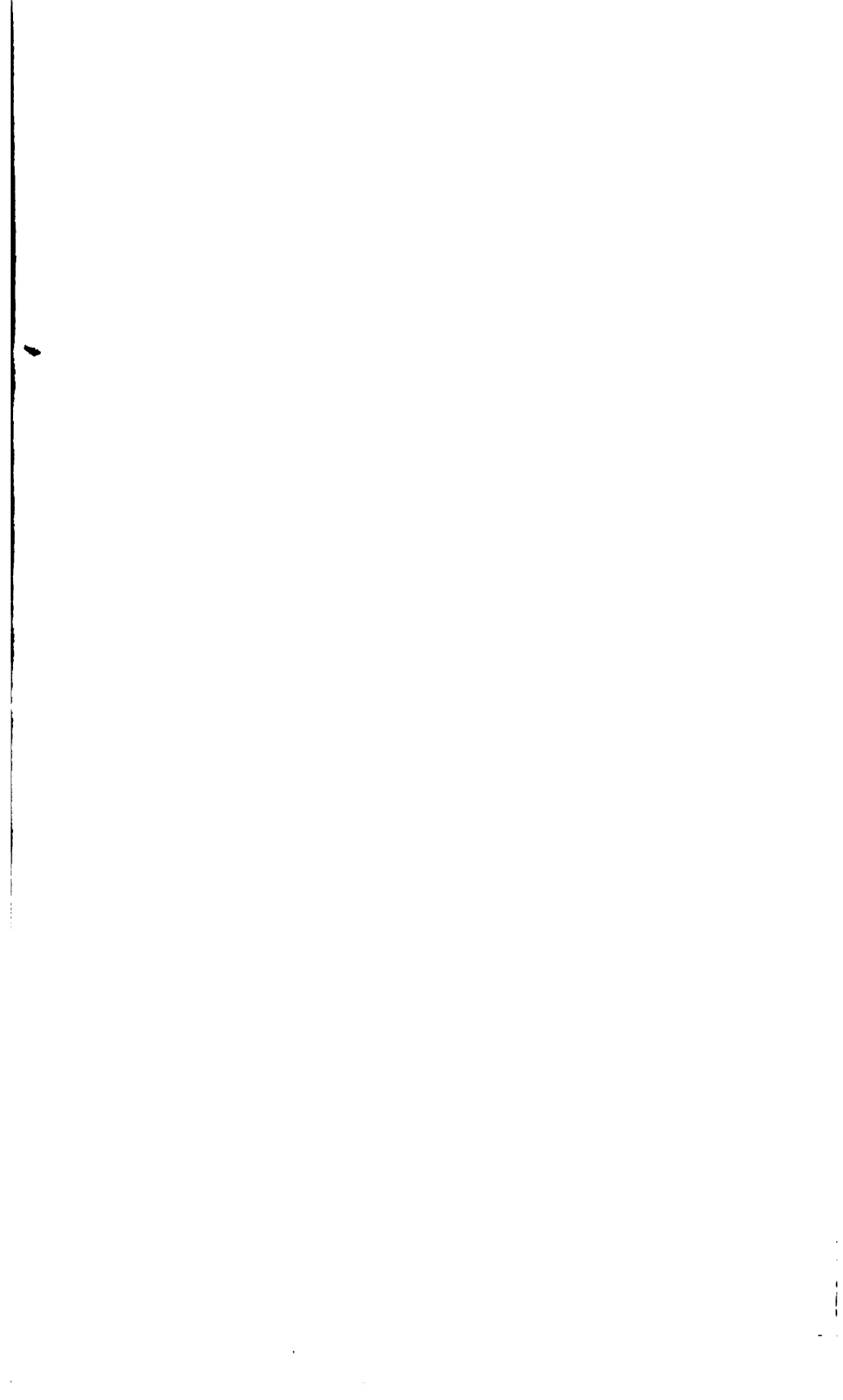
WITNESS.

1. In order for the wife to be a competent witness for the husband under the act of 1858, (see Session Laws of 1858, p. 23,) it seems her evidence must be of matters conducted by her as agent of the husband, and of which he has no personal knowledge. *Eastabrook v. Prentiss*, 457.

2. When it became material to show the state of the plaintiff's accounts at a given time, and it was shown the books were kept by the wife, but from original memoranda kept by the husband from day to day, *held*, she was not a competent witness for the plaintiff. *Ib.*

See EVIDENCE, 15, 23.

Ex. G. a. a.



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